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THE MODERN LAW of PARTNERSHIP

INCLUDING A FULL CONSIDERATION OF
JOINT ADVENTURES, LIMITED PARTNERSHIPS, AND JOINT STOCK COMPANIES, TOGETHER WITH A TREATMENT OF THE UNIFORM PARTNERSHIP ACT

By
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ASSISTED BY THE PUBLISHERS' EDITORIAL STAFF

IN TWO VOLUMES
VOLUME II

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THE LAW OF PARTNERSHIP

CHAPTER XX

ADMINISTRATION OF PARTNERSHIP AFFAIRS AFTER DEATH OF PARTNER

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§ 615. In general—Dissolution or continuation of business.—As was seen in the preceding chapter, death of a partner dissolves the partnership, without any notice or judicial decree simply by operation of law.[1] However, the business may be continued after the death of a partner if it is so provided by the partnership agreement, and such a provision is binding on the estate of the deceased partner,[2] or if it is so directed in the will of a deceased partner.[3] Otherwise, as in the case of any other dissolution, there can be only limited continuance of the business for the purpose of winding it up.[4] But a mere provision in partnership articles that the partnership is to continue for a fixed

[1] McCall v. Moss, 112 Ill. 493; McKinzie v. United States, 34 Ct. Cl. (U. S.) 278; Washburn v. Goodman, 17 Pick. (Mass.) 519; Durant v. Pierson, 124 N. Y. 444, 26 N. E. 1095, 12 L. R. A. 146, 21 Am. St. 686; McGrath v. Cowen, 57 Ohio St. 385, 49 N. E. 338; Landa v. Shook, 87 Tex. 608, 30 S. W. 536; Davis v. Christian, 15 Grat. (Va.) 11; Phillips v. Alhambra Palace Co., 70 L. J. Q. B. 26, L. R. [1900] 1 Q. B. 59. See also Painter v. Painter, 133 Cal. XIX, 65 Pac. 135; Bass Dry Goods Co. v. Granite City Mfg. Co., 116 Ga. 176, 42 S. E. 415; Mulherin v. Rice, 106 Ga. 810, 32 S. E. 865; Douthart v. Logan, 190 Ill. 243, 60 N. E. 507; Dexter v. Dexter, 43 App. Div. (N. Y.) 268, 60 N. Y. S. 371. See cases cited in note 57, ante § 579.

[2] Brew v. Hastings, 196 Pa. St. 222, 46 Atl. 257, 79 Am. St. 706; Scholefield v. Eichelberger, 7 Pet. (U. S.) 586, 8 L. ed. 793; Vincent v. Martin, 79 Ala. 540; Rand v. Wright, 141 Ind. 226, 39 N. E. 447; Powell v. Hopson, 13 La. Ann. 626; Stanwood v. Owen, 14 Gray (Mass.) 195; Berry v. Folkes, 60 Miss. 576; Exchange Bank v. Tracy, 77 Mo. 594; Edwards v. Thomas, 66 Mo. 468; In re Laney, 50 Hun 15, 2 N. Y. S. 443, 18 N. Y. St. 463 (affd. 119 N. Y. 607, 23 N. E. 1143); Gratz v. Bayard, 11 Serg. & R. (Pa.) 41; Wilcox v. Derickson, 168 Pa. St. 331, 31 Atl. 1080; Alexander v. Lewis, 47 Tex. 481; McNeish v. United States &c. Oat Co., 57 Vt. 316; Davis v. Christian, 15 Grat. (Va.) 11; Kirkman v. Booth, 11 Beav. 273.

[3] Pitkin v. Pitkin, 7 Conn. 307, 18 Am. Dec. 111; Burwell v. Mandeville, 2 How. (U. S.) 560, 11 L. ed. 378; Berry v. Folkes, 60 Miss. 576; Citizens' Mut. Ins. Co. v. Ligon, 59 Miss. 305; Exchange Bank v. Tracy, 77 Mo. 594; Ballantine v. Frelinghuysen, 38 N. J. Eq. 266; Wilson v. Simpson, 89 N. Y. 619; Davis v. Christian, 15 Grat. (Va.) 11; Kirkman v. Booth, 11 Beav. 273.

[4] Johnson v. Totten, 3 Cal. 343, 58 Am. Dec. 412; Maynard v. Richards, 166 Ill. 466, 46 N. E. 1138, 57 Am. St. 145; Western Stage Co. v. Walker, 2 Iowa 504, 65 Am. Dec. 789; Powell v. Hopson, 13 La. Ann. 626; Davis v. Megroz, 55 N. J. L. 427, 26 Atl. 1009; Kinsler v. McCauts, 4 Rich. L. (S. Car.) 46, 5 Rich. L. 608, 53 Am. Dec. 711; Brown v. Higginbotham, 5 Leigh (Va.) 583, 27 Am. Dec. 618.

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period does not prevent a dissolution of a partnership upon the death of a partner.[5] A provision, it has been held, for the continuation of the firm in case of the death of one partner, substituting another in his stead, while valid, does not work a continuation of the old firm, but in reality creates a new one where the new person enters thereunder.[6] Hence the rule that every partnership must dissolve upon death of a partner.[7] An Indiana case[8] has indicated that a continuance of a partnership may be authorized by a court of equity after the death of a partner, on behalf of infants. It is doubtful, however, if courts of equity in most jurisdictions would recognize such power, at least to a greater extent than a mere temporary order. Certain it is that, any court of equity, in view of the accepted general rule, even though it might recognize the rule in the Indiana case, would nevertheless refuse to exercise the right unless the necessity therefor was very apparent, and the evidence thereof very plain.

§ 616. Surviving partner.—In general the character of a surviving partner[9] is not so peculiar as to exclude him from the scope and meaning of the principles noted in the preceding chapter concerning the winding up of partnership business after dissolution.[10] Upon such a one devolves the duty of winding up the partnership affairs and of accounting to the personal repre-

[5] Hornaday v. Cowgill, 54 Ind. App. 631, 101 N. E. 1030; Scholefield v. Eichelberger, 7 Pet. (U. S.) 586, 8 L. ed. 793; Knapp v. McBride, 7 Ala. 19; Hoard v. Clum, 31 Minn. 186, 17 N. W. 275.

[6] Kennedy v. Porter, 109 N. Y. 526, 17 N. E. 426; McGrath v. Cowan, 57 Ohio St. 385, 49 N. E. 338; Hornaday v. Cowgill, 54 Ind. App. 631, 101 N. E. 1030.

[7] Laney v. Laney, 6 Dem. Surr. (N. Y.) 241.

[8] Powell v. North, 3 Ind. 392, 56 Am. Dec. 513.

[9] For character of words "surviving partner" in pleadings, as descriptio personæ, see Swing v. Hill, 44 Ind. App. 140, 88 N. E. 721; Murphy v. Cochran, 146 Iowa 443, 123 N. W. 349.

[10] "The winding up or settling of the partnership affairs after the death of one of the partners may be said to consist, as a general thing, in selling the property, receiving moneys due the firm, paying the firm debts and the advances of the partners, returning the capital contributed by each partner, and dividing the profits." Maynard v. Richards, 166 Ill. 466, 46 N. E. 1138, 57 Am. St. 145.

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sentative of his deceased associate.[11] The right of the surviving partner to wind up the business after the death of a partner is well settled in the general law. Such right is governed in some states by statute, which differs considerably as to details. The Ohio law, for example, relating to the rights and duties of surviving partners, is made very explicit by express statute, which provides that upon the death of a member of any partnership in the state, the surviving partners shall immediately after the appointment of an administrator or executor of the deceased partner's estate, make application to the probate court for the appointment of appraisers of the partnership assets and liabilities, and, with the consent of the executor or administrator and the court, may take the deceased partner's interest in the firm assets at the appraised value, by making satisfactory arrangements for the payment of the firm debts, unless by the articles of partnership or will of the deceased partner a different mode is prescribed. If the surviving partner does not, within the time and in the manner prescribed, take the assets of the firm, then a receiver is appointed upon the application of the executor or administrator, to wind up and dispose of the partnership assets.

[11] Tillery v. Tillery, 155 Ala. 495, 46 So. 582; Didlake v. Roden Grocery Co., 160 Ala. 484, 49 So. 384; In re Dobert, 165 Fed. 749; Cooley v. Miller (Cal.), 142 Pac. 83; Raisch v. Warren, 18 Cal. App. 665, 124 Pac. 95; Whitaker v. Jordan, 104 Maine 516, 72 Atl. 682; Lanahan v. Lanahan, 110 Md. 176, 72 Atl. 672; Hewitt v. Hayes, 204 Mass. 586, 90 N. E. 985, 27 L. R. A. (N. S.) 154; Drucke v. Boylon (Mich.), 125 N. W. 416; Barton v. Lovejoy, 56 Minn. 380, 57 N. W. 935, 45 Am. St. 482; Weiss v. Hamilton, 40 Mont. 99, 105 Pac. 74; Peck v. Knapp, 137 N. Y. S. 70; Joseph v. Herzig, 135 App. Div. 141, 120 N. Y. S. 34; Reinhardt v. Reinhardt, 134 App. Div. 440, 119 N. Y. S. 285; Russell v. McCall, 141 N. Y. 437, 36 N. E. 498, 38 Am. St. 807; McPherson v. Swift, 22 S. Dak. 165, 116 N. W. 76, 133 Am. St. 907; Roberts v. Nunn (Tex. Civ. App.), 169 S. W. 1086; Goldstein v. Susholtz, 46 Tex. Civ. App. 582, 105 S. W. 219. However, the "right" of a surviving partner to administer the affairs of the dissolved firm may, it seems, be waived. Barnes v. Stone, 198 Mo. 471, 95 S. W. 915. See further Welborn v. Coon, 57 Ind. 270. Surviving partner may borrow money when necessary to the winding up of the partnership concerns. Rosenthal v. Hasberg, 84 N. Y. S. 290; Herron v. Wampler, 194 Pa. St. 277, 45 Atl. 81; Kenney v. Howard, 68 Vt. 194, 34 Atl. 700.

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It is seen that the Ohio statute designates the exact rights and duties of the surviving partner as to method of procedure,[12] but in so doing differs somewhat in detail from the old English law, which has been carried down into the law of many of our states. The English rule as stated by Mr. Lindley is that "On the death of a partner the surviving members of the firm are the proper persons to get in and pay its debts."[13] The law in the various states varies, in some respects, from the English rule, but in the great majority of instances follows the general rule that the survivors have the power to close up the partnership affairs. The federal cases hold[14] that on the death of a partner all the personal estate and assets of the firm, including choses in action, vest in the surviving partner. Much the same rule has been adhered to in Arkansas, California, Connecticut, Florida, Illinois, Michigan and New York, where it has been held that the survivor has authority to receive the firm assets and settle up its affairs.[15] It has been held, however, in numerous instances, that the survivor, when he takes the assets, takes the decedent's interest in a trust capacity, and must act in all due fairness and keep the representative of the decedent fully advised as to the condition of the firm.[16] The Ohio statute, above cited, would appear to change entirely the general rule, but it is held not to do so,[17] and that the right of surviving partners at common law to take the assets of the firm, close up the business, and account to the executors of a deceased partner, and to carry on the business after the death of one partner who so directs in his will,

[12] Cooley v. Miller (Cal.), 142 Pac. 83; National Safe Deposit Co. v. Stead, 250 Ill. 584, 95 N. E. 973, Ann. Cas. 1913 E, 305n; Dow v. Simpson, 17 N. Mex. 357, 132 Pac. 568; Sherrod v. Mayo (N. Car.), 72 S. E. 216; Thomas v. Mann (Wyo.), 135 Pac. 1088.

[13] Lindley Partnership, p. 591.

[14] Bischoffsheim v. Baltzer, 20 Fed. 890.

[15] Marlatt v. Scantland, 19 Ark. 443; Allen v. Hill, 16 Cal. 113; Tillotson v. Tillotson, 34 Conn. 335; Florida Terr. v. Redding, 1 Fla. 242; Miller v. Jones, 39 Ill. 54; Connor v. Allen, Harr. (Mich.) 371; Murray v. Mumford, 6 Cow. (N. Y.) 441.

[16] Ogden v. Aster, 6 N. Y. Super. Ct. 311; Heath v. Waters, 40 Mich. 457.

[17] Covington City Bank v. Wright, 6 Ohio Dec. 350, 4 N. P. 173.

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and to make obligations to bind individual property of the deceased partner, was not abolished by the Ohio statute providing how an executor should proceed as to partnership property, and that, if the survivor fails to elect to take the partnership property under the statute, the business be wound up by proceedings in court by the survivor or executor. The same case holds that, even under a will to continue the business, made by the deceased partner, the surviving partner can not bind that part of the estate of the deceased partner not engaged in the business at the time of his death. It is difficult, however, to follow the reasoning of the court in the above case, or to see its logic. The mere fact that the statute does provide certain steps to be pursued by the executor or administrator, in case the survivor does not elect to take the deceased partner's share according to the statute, shows that, to this extent (and probably no further) the common law was abolished. In the second place, under the accepted principles of partnership law, it is difficult to see how the estate could continue as a member of the firm, without assuming the liability of a partner for losses which might extend to property of the deceased partner's estate outside of the partnership. As a corollary to the surviving partner's right to wind up the business, the law permits a surviving partner to continue the business for a reasonable length of time for the purpose of executing existing firm contracts[18] and, it has been declared, for the purpose of disposing of the stock of goods on hand.[19]

§ 617. Rights of surviving partner to control firm property and assets.—Generally, it may be said that in the surviving partner, to the end that he may liquidate the partnership

[18] Little v. Caldwell, 101 Cal. 553, 36 Pac. 107, 40 Am. St. 89; Jacksonville, M. P. R. & Nav. Co. v. Warriner, 35 Fla. 197, 16 So. 898; Mason v. Tiffany, 45 Ill. 392; Culbertson v. Salinger (Iowa), 117 N. W. 6; Rust v. Chisolm, 57 Md. 376; Cowham v. Shipman, 151 Mich. 673, 115 N. W. 991; Gaskill v. Weeks, 154 Mich. 223, 117 N. W. 647; Weiss v. Hamilton, 40 Mont. 99, 105 Pac. 74; King v. Leighton, 100 N. Y. 386, 3 N. E. 594; Rowell v. Adams, 83 S. Car. 124, 65 S. E. 207. See also Denver v. Roane, 99 U. S. 355, 25 L. ed. 476.

[19] Didlake v. Roden Grocery Co., 160 Ala. 484, 49 So. 384.

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affairs, temporarily reposes the title, legal and equitable respectively, to the personalty and realty formerly belonging to the firm.[20] But it was held in some earlier cases,[21] and is still the rule in Louisiana,[22] that the surviving partner is only a tenant in common with the personal representatives of the deceased in partnership property, in possession. And, the decisions following the general rule are not in harmony as to the exact terms to be used in describing the nature of a surviving partner's interest in firm property, as is apparent from the following quotations: "The surviving partner takes the firm property as its absolute owner, though subject to a liability to account for its proceeds and for their application to the payment of the firm debts and the settlement of the partnership accounts."[23] "On the death

[20] Tillery v. Tillery, 155 Ala. 495, 46 So. 582; Rice v. Merchants' & Planters' Nat. Bank, 100 Ala. 617, 13 So. 659; Clay v. Field, 34 Fed. 375; Anderson v. Goodwin, 125 Ga. 663, 54 S. E. 679; Galbraith v. Tracy, 153 Ill. 54, 38 N. E. 937, 28 L. R. A. 129, 46 Am. St. 867; American Bonding Co. v. State, 40 Ind. App. 559, 82 N. E. 548; Jones v. Dulaney, 27 Ky. L. 702, 86 S. W. 547; Bassett v. Miller, 39 Mich. 133; Priest v. Chouteau, 85 Mo. 398, 55 Am. Rep. 373; Clark v. Fleischmann, 81 Nebr. 445, 116 N. W. 290; Haggerty v. Bodkin, 72 N. J. Eq. 473, 66 Atl. 420; Reinhardt v. Reinhardt, 134 App. Div. 440, 119 N. Y. S. 285; In re Weir, 59 Misc. 320, 112 N. Y. S. 278; In re Thieriot, 102 N. Y. S. 952; Callanan v. Keesville &c. R. Co., 48 Misc. 476, 95 N. Y. S. 513; Bauchle v. Smylie, 104 App. Div. 513, 93 N. Y. S. 709; Secor v. Tradesmen's Nat. Bank, 92 App. Div. 294, 87 N. Y. S. 181; Leary v. Boggs, 41 Hun 643, 1 N. Y. S. 571; Fairchild v. Fairchild, 64 N. Y. 471; Betts v. June, 51 N. Y. 274; Hiscock v. Phelps, 49 N. Y. 97; Tillinghast v. Champlin, 4 R. I. 173, 67 Am. Dec. 510; Rowell v. Adams, 83 S. Car. 124, 65 S. E. 207; Weld v. Johnson Mfg. Co., 86 Wis. 552, 57 N. W. 374.

[21] Canfield v. Hard, 6 Conn. 180; Adams v. Ward, 26 Ark. 135; Wilson v. Soper, 13 B. Mon. (Ky.) 411, 56 Am. Dec. 573; Strathy v. Crooks, 2 U. C. Q. B. 51.

[22] Junek v. Hezeau, 11 La. Ann. 731; Shipman v. Hickman, 9 Rob. (La.) 149; Notrebe v. McKinney, 6 Rob. (La.) 13; Mathison v. Field, 3 Rob. (La.) 44; Flower v. O'Conner, 7 La. 198; Simmins v. Parker, 4 Mart. (N. S.) (La.) 200; Jones v. Thorn, 2 Mart. (N. S.) (La.) 463; Wyer v. Winchester, 2 Mart. (N. S.) (La.) 69.

[23] Hewitt v. Hayes, 204 Mass. 586, 90 N. E. 985, 27 L. R. A. (N. S.) 154, in which the court also said: "It follows that upon the death of Wells [the managing partner], Bangs as the sole surviving partner at once became the owner of all the partnership property, and charged with the duty of winding up the affairs of the firm, turning its assets into money and ap-

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of a partner the surviving partners succeed to all partnership property, whether real or personal, in trust for the purposes of liquidation, even though the deceased was appointed by agreement sole liquidator."[24] The survivors do not take such [personal] assets as trustees, but, as survivors, hold the legal title, subject to such equitable rights as the representatives have in the due application of the proceeds."[25] "He [the surviving partner] had the legal title to the assets, and he held them as the legal owner, and not as trustee, in the strict sense of that term. In equity, however, he was to be regarded, to some extent, as a trustee. * * * The position is somewhat anomalous—not exactly and wholly a trustee, and yet not a full owner of the assets which he takes or retains possession of by reason of survivorship."[26] The right of the surviving partner to the real estate of the copartnership "is an equitable right, accompanied by an equitable title."[27] It follows from the nature of the surviving partner's title to firm property that, until he has performed his functions, he is entitled to quiet and exclusive possession of all the firm assets.[28] Neither heirs nor personal representatives have a right to possession of partnership property, until the part-

plying such money to the payment of its debts. * * * For this purpose he was entitled to demand and receive from the defendants, the executors of the will of his deceased [managing] partner, whatever property of the firm might come into their hands. * * * As was said by Colt, J., in Shearer v. Paine, 12 Allen 289, 291, this right of the surviving partner is 'a right incident to all partnerships and one of which he can not be deprived by the personal representative of the deceased partner in the absence of any allegation of mismanagement or want of capacity,' and there is no such allegation here. * * * This right extends also to all real estate of the partnership, in whosoever name the legal title may have been, so far as may be necessary to wind up its affairs, pay its debts, and settle the partnership accoounts."

[24] McPherson v. Swift, 22 S. Dak. 165, 116 N. W. 76, 133 Am. St. 907.

[25] Wilson v. International Bank, 125 App. Div. 568, 109 N. Y. S. 1027.

[26] Russell v. McCall, 141 N. Y. 437, 36 N. E. 498, 38 Am. St. 807. Quoted with approval in Callanan v. Keeseville &c. R. Co., 48 Misc. 476, 95 N. Y. S. 513. See also Costello v. Costello, 209 N. Y. 252, 103 N. E. 148 (affg. judgment 152 App. Div. 280, 137 N. Y. S. 132).

[27] Shanks v. Klein, 104 U. S. 18, 26 L. ed. 635. Cited with approval in Megibben v. Perin, 49 Fed. 183 (revd. 53 Fed. 86, 3 C. C. A. 443).

[28] In re Capria's Estate, 151 N. Y.

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nership affairs are liquidated by the surviving partner and he has delivered the balance to them.[29] Where the surviving partner has the legal right to the possession of partnership property, the court will not deprive him of that right, ordinarily, but if there is proof that he is mismanaging the affairs of the firm, or that there is danger to the partnership assets by reason of his possession, the court may deprive him of the right to possession of the firm assets, and appoint a receiver.[30] The surviving partner, along with the right to possession and control of firm property, naturally has the right to collect all the claims due the partnership.[31]

S. 38" Wickliffe v. Eve, 17 How. (U. S.) 468, 15 L. ed. 163; In re Coe, 157 Fed. 308; Dickens v. Dickens, 154 Ala. 440, 45 So. 630; Evans v. Silvey, 144 Ala. 398, 42 So. 62; Franklin v. Trickey, 9 Ariz. 282, 80 Pac. 352; Adams v. Ward, 26 Ark. 135; McKay v. Joy, 70 Cal. 581, 11 Pac. 832; Filley v. Phelps, 18 Conn. 294; Price v. Hicks, 14 Fla. 565; Huggins v. Huggins, 117 Ga. 151, 43 S. E. 759; Harrah v. State, 38 Ind. App. 495, 76 N. E. 443, 77 N. E. 747; Commercial Nat. Bank v. Proctor, 98 Ill. 558; Starr v. Case, 59 Iowa 491, 13 N. W. 645; Whittaker v. Jordan, 104 Maine 516, 72 Atl. 682; Hewitt v. Hayes, 204 Mass. 586, 90 N. E. 985, 27 L. R. A. (N. S.) 154; Pfeffer v. Steiner, 27 Mich. 537; Robertshaw v. Hanway, 52 Miss. 713; Barnes v. Stone, 198 Mo. 471, 95 S. W. 915; Holman v. Nance, 84 Mo. 674; Loeb v. Huston (Nebr.), 152 N. W. 553; Reinhardt v. Reinhardt, 134 App. Div. 440, 119 N. Y. S. 285; In re Thieriot, 102 N. Y. S. 952; Enck v. Gerding, 67 Ohio St. 245, 65 N. E. 880; Shipe's Appeal, 114 Pa. St. 205, 6 Atl. 103; Hawkins v. Capron, 17 R. I. 679, 24 Atl. 466; Gant v. Reed, 24 Tex. 46, 76 Am. Dec. 94; Amarillo Nat. Bank v. Harrell (Tex. Civ. App.), 159 S. W. 858; In re Auerbach, 23 Utah 529, 65 Pac. 488; Stearns v. Houghton, 38 Vt. 583; Dyer v. Morse, 10 Wash. 492, 39 Pac. 138, 28 L. R. A. 89. And compare Flynn v. Seale, 2 Cal. App. 665, 84 Pac. 263; Campbell v. Hart, 118 La. 871, 43 So. 533. Surviving partners may waive the exclusive right to the possession of the partnership property, to sell and dispose of the same. Welborn v. Coon, 57 Ind. 270. See further Stubbings v. O'Connor, 102 Wis. 352, 78 N. W. 577. Quære—Has a surviving dormant partner this right of possession and the right to settle the firm business? Johnson v. Ames, 6 Pick. (Mass.) 330.

[29] Cooley v. Miller (Cal.), 142 Pac. 83.

[30] Connor v. Allen, Harr. (Mich.) 371; Shad v. Fuller, R. M. Charlt. (Ga.) 501; Walker v. House, 4 Md. Ch. 39; Evans v. Evans, 9 Paige (N. Y.) 178; Collins v. Young, 1 Macq. 385; Hartz v. Schrader, 8 Ves. Jr. 317.

[31] Davis v. Sowell, 77 Ala. 262; Cockerham v. Bostey, 52 La. Ann. 65, 26 So. 814; Peters v. Davis, 7 Mass. 257; O'Connell v. Schwanabeck, 76 Mich. 517, 43 N. W. 599; Bernard v. Wilcox, 2 Johns. Cas. (N. Y.) 374; Rice v. Richards, 45 N. Car. 277;

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A surviving partner may sue and recover the entire value of the property.[32] The surviving partner may under the Utah code sue and recover payments of usury made by the firm.[33] But the personal representatives of a deceased partner are entitled to personal property owned by him individually and used by the firm.[34]

§ 618. Power of surviving partner to complete contracts. —Does the winding up of the affairs of a firm by a surviving partner include the completion of unfinished contracts? The general rule of law is that contracts for personal skill of the deceased die at the death of the party who contracted to exercise the skill, but that where the contract does not call for such personal services, it does not expire at his death. For example, a noted lecturer, musician, or business man, might die, while under a contract for personal skill and services, and the contract, as a result, would become of no effect, from that time. On the contrary, a sewer contractor might die while under a contract to construct a sewer, without ending the contract, as his contract could, as a rule, be performed by others, while the first class above named could not delegate their duties.[35] Winding up the partnership business must necessarily include the closing up of those obligations which are binding upon the firm, hence the surviving partner has the authority, in general, to complete such contracts, existing at the death of the deceased partner, as do not call for the personal skill and efforts of the deceased partner,[36] and he

Davis v. Church, 1 Watts & S. (Pa.) 240; Younts v. Starnes, 42 S. Car. 22, 19 S. E. 1011; Grether v. Smith, 17 S. Dak. 279, 96 N. W. 93; Potter v. Stransky, 48 Wis. 235, 4 N. W. 95; Dixon v. Hamond, 2 B. & Ald. 310; Kempe v. Andrews, Carth. 170, 3 Lev. 290; Martin v. Crompe, 1 Ld. Raym. 340, 2 Salk. 444.

[32] Amarillo Nat. Bank v. Harrell (Tex. Civ. App.), 159 S. W. 858.

[33] Cobb v. Hartenstein (Utah), 152 Pac. 424.

[34] Van Damm v. Van Damm, 140 N. Y. S. 1005; Bane v. Adair (Va.), 82 S. E. 734.

[35] Starr v. Cosgrave Brewing &c. Co., 12 Can. Sup. Ct. 571 (revg. 11 Ont. App. 156, restoring 5 Ont. 189); Burnet v. Hope, 9 Ont. 10.

[36] Weiss v. Hamilton, 40 Mont. 99, 105 Pac. 74; Davis v. Sowell, 77 Ala. 262; Hughes v. Gross, 166 Mass. 61, 43 N. E. 1031, 32 L. R. A. 620, 55 Am. St. 375; United States v. United States Fidelity &c. Co., 123 N. Y. S.

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may borrow, in the firm name and upon firm property, for such purpose.[37] It has often been held that where a member of a law firm dies, the client may look to the surviving member to complete the services, and such partner may recover a fair compensation.[38] This rule does not hold if the contract is specially for the services of the deceased partner.[39] No new obligations are to be incurred by the surviving partner, however, unless for the purpose of winding up unfinished obligations in a proper manner, and to avoid loss to the estate.[40]

§ 619. Effect of death of partner on contract with employe. —It has been held that the death of a partner, since it dissolves the partnership, terminates the contract of an employé of the partnership, such a contract being dependent upon the life of the employé and the life of the partnership, if death in either case was not voluntary.[41] The reason for this rule is thus given by a text-writer.[42] "Where a servant is employed by a firm, a dissolution of the firm dissolves the contract, so that a servant is absolved therefrom, but if the dissolution results from the act of the parties they are liable to the servant for his loss therefrom, but if the dissolution results from the death

938; Phillips v. Alhambra Palace Co., [1901] 1 K. B. 59.

[37] Butchart v. Dresser, 10 Hare 453.

[38] Smith v. Hill, 13 Ark. 173; Moses v. Bagley, 55 Ga. 283; Walker v. Goodrich, 16 Ill. 341; Clifton v. Clark, 83 Miss. 446, 36 So. 251, 66 L. R. A. 821, 102 Am. St. 458; Dowd v. Troup, 57 Miss. 204; McCoon v. Galbraith, 29 Pa. St. 293.

[39] Clifton v. Clark, 83 Miss. 446, 36 So. 251, 66 L. R. A. 821, 102 Am. St. 458; Landa v. Shook, 87 Tex. 608, 30 S. W. 536; Wright v. McCampbell, 75 Tex. 644, 13 S. W. 293. See also McGill v. McGill, 2 Met. (Ky.) 258.

[40] Oliver v. Forrester, 96 Ill. 315; Andrews v. Stinson, 254 Ill. 111, 98 N. E. 222, Ann. Cas. 1913 B, 927n (revg. judgment 164 Ill. App. 25); Exchange Bank v. Tracey, 77 Mo. 594; Castle v. Reynolds, 10 Watts (Pa.) 51.

[41] Louis v. Elfelt, 89 Cal. 547, 26 Pac. 1095; Griggs v. Swift, 82 Ga. 392, 9 S. E. 1062, 5 L. R. A. 405, 14 Am. St. 176; Redheffer v. Leathe, 15 Mo. App. 12; Greenburg v. Early, 4 Misc. 99, 23 N. Y. S. 1009, 53 N. Y. St. 130, 30 Abb. N. Cas. 300; Burnet v. Hope, 9 Ont. 10. See also Mason v. Secor, 76 Hun 178, 27 N. Y. S. 570, 57 N. Y. St. 333. Compare Connell v. Owen, 4 U. C. C. P. 113.

[42] Wood, Master and Servant, § 163, quoted in Griggs v. Swift, 82 Ga. 392, 9 S. E. 1062, 5 L. R. A. 405, 4 Am. St. 176.

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of a member of the firm, the dissolution resulting by operation of law, and not from the act of the parties, no action for damages will lie. * * * So, if a firm consists of two or more persons, and one or more of them dies, but the firm is not thereby dissolved, the contract still subsists, because one or more of his partners is still in the firm, and this is so even though other persons are taken into the firm. The test is whether the firm is dissolved. So long as it exists, the contract is in force; but when it is dissolved the contract is dissolved with it, and the question as to whether damages can be recovered therefor will depend upon the question whether the dissolution resulted from the act of God, the operation of law or the act of the parties." But there are cases which hold that where the business is continued after the death of a partner, a contract of employment previously made is binding on the surviving partners who continue the business, and they are liable in damages for a breach of it, the theory being that a contract for services for a specified time is a subsisting contract, which can not be annulled except with the consent of both parties, and from liability on which the partnership is not relieved by the death of a partner.[43] In England it has been held that the death of a partner terminated a contract of employment with a partnership, since it was entered into with the implied condition that all the parties should live.[44]

§ 620. **Power of alienation of firm property.**—The power of alienation, whether direct, by sale, or indirect, by incumbrance, of firm property by a surviving partner, when for proper purposes, is too well settled to raise serious question. There seems to be, however, in most jurisdictions, a distinction between real and personal property of the firm, as regards the purpose for which such sale may be effected. Personal property and, it seems, real property when considered as personalty, may be sold by the surviving partner both for the purpose of satis-

[43] Hughes v. Gross, 166 Mass. 61, 43 N. E. 1031, 32 L. R. A. 620, 55 Am. St. 375; Johnson v. Judge, 16 Pa. Super. Ct. 137. See Martin v. Hunt, 1 Allen (Mass.) 418.

[44] Tasker v. Shepherd, 6 H. & N. 575.

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fying firm obligations, and also for the purpose of distribution,[45] but he can sell the firm property for no other purpose.[46] Such sale may be made even though the partnership and its members are insolvent.[47] A surviving partner may assign judgment belonging to the firm.[48] As to firm real estate, the general rule seems to be that it can only be sold to pay debts,[49] this being analogous to administration of estates, where the title descends to the heirs, unless it becomes necessary for the personal representative, acting within statutory requirements, to sell the real property to pay the debts of the decedent. A surviving partner may likewise incumber by mortgage or pledge property of the firm, when it is necessary, and is done for the benefit of the firm, and when this is done in good faith, it has been held that the mortgage is effectual against the partnership creditors as well as against the representatives of the deceased partner, even

[45] Lindner v. Bank, 49 Nebr. 735, 68 N. W. 1028; Bohler v. Tappan, 1 Fed. 469, 1 McCrary (U. S.) 134; Loeschigk v. Hatfield, 51 N. Y. 660; In re Bourne [1906], 2 Ch. 427. See also Shanks v. Klein, 104 U. S. 18, 26 L. ed. 635; Perin v. Megibben, 53 Fed. 86, 3 C. C. A. 443; Clay v. Field, 34 Fed. 375; Burchinell v. Koon, 8 Colo. App. 463, 46 Pac. 932; Hartnett v. Stillwell, 121 Ga. 386, 49 S. E. 276, 104 Am. St. 151; Bass Dry Goods Co. v. Granite City Mfg. Co., 116 Ga. 176, 42 S. E. 415; McKean v. Vick, 108 Ill. 373; Hughes v. Trahern, 64 Ill. 48; Ives v. Ashelby, 26 Ill. App. 244; Walling v. Burgess, 122 Ind. 299, 22 N. E. 419, 23 N. E. 1076, 7 L. R. A. 481; Welborn v. Coon, 57 Ind. 270; Milner v. Cooper, 65 Iowa 190, 21 N. W. 558; Carter v. Flexner, 92 Ky. 400, 17 S. W. 851, 13 Ky. L. 608; Cockerham v. Bosley, 52 La. Ann. 65, 26 So. 814; Thayer v. Badger, 171 Mass. 279, 50 N. E. 541; Bassett v. Miller, 39 Mich. 133; Barry v. Briggs, 22 Mich. 201; Stewart v. Burkhalter, 28 Miss. 396; Priest v. Chouteau, 12 Mo. App. 252 (affd. 83 Mo. 398, 55 Am. Rep. 373); Durant v. Pierson, 124 N. Y. 444, 26 N. E. 1095, 12 L. R. A. 146, 21 Am. St. 686; Williams v. Whedon, 109 N. Y. 333, 16 N. E. 365, 4 Am. St. 460; Herd v. Delp, 1 Heisk. (Tenn.) 530.

[46] Miller v. Kingsbury, 128 Ill. 45. 21 N. E. 209; Brown v. Watson, 66 Mich. 223, 33 N. W. 493; Stewart v. Burkhalter, 28 Miss. 396; Scott v. Tupper, 8 Smed. & M. (Miss.) 280. See also Titman v. Twelfth Ward Bank, 12 N. Y. S. 634, 58 Hun 610, 35 N. Y. St. 660 (affd. 124 N. Y. 667, 27 N. E. 855).

[47] Burchinell v. Koon, 25 Colo. 59, 52 Pac. 1100 (affg. 8 Colo. App. 463, 46 Pac. 932); Hadley v. Milligan, 100 Ind. 49; Willson v. Nicholson, 61 Ind. 241.

[48] Loeb v. Huston's Estate (Nebr.), 152 N. W. 553.

[49] Shanks v. Klein, 104 U. S. 18, 26 L. ed. 635. See § 626.

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though the effect is to prefer one creditor.[50] And it has been held that if necessary to prevent sacrifice, he may give a trust deed upon partnership real estate to secure a firm debt.[51] But it is held that a surviving partner can not mortgage firm real estate of an insolvent firm thus preferring one creditor.[52] Some cases have held a mortgage by a surviving partner valid where part of the debt was contracted by the surviving partner, if for the benefit of the firm.[53] In another case such mortgage to secure a loan made by the surviving partner for paying off a firm debt, has been held a new contract and invalid.[54] A mortgage by a surviving partner who is engaged in winding up the firm business is, it seems, valid as to strangers to the partnership affairs and not subject to attack by them.[55] A mortgage of firm property to secure the individual debt of a surviving partner conveys only his interest.[56] The same is true where a surviving partner by a quitclaim deed purported to convey all the partnership assets and all his rights as surviving partner, and only his individual interest was held to pass.[57]

§ 621. Power of surviving partner to make assignment for benefit of creditors.—As a general rule, when not prohib-

[50] Burchinell v. Koon, 8 Colo. App. 463, 46 Pac. 932; Bohler v. Tappan, 1 McCrary (U. S.) 134, 1 Fed. 469; Courtland Forging Co. v. First Nat. Bank, 141 Ind. 518, 40 N. E. 1070; First Nat. Bank v. Parsons, 128 Ind. 147, 27 N. E. 486; People's Nat. Bank v. Wilcox, 136 Mich. 567, 100 N. W. 24, 4 Ann. Cas. 465n; Bell v. Hepworth, 134 N. Y. 442, 31 N. E. 918; Durant v. Pierson, 124 N. Y. 444, 26 N. E. 1095, 12 L. R. A. 146, 21 Am. St. 686; Williams v. Whedon, 109 N. Y. 333, 16 N. E. 365, 4 Am. St. 460; In re Crane, 4 Ohio S. & C. P. Dec. 398, 29 Wkly. Law Bul. 93; In re Clough, L. R. 31 Ch. Div. 324; Butchart v. Dresser, 4 DeG., M. & G. 542; In re Bourne, [1906] 2 Ch. 427, 3 B. R. C. 569 and note (affg. [1906] 1 Ch. 113). See Espy v. Comer, 80 Ala. 333.

[51] Breen v. Richardson, 6 Colo. 605.

[52] Anderson v. Norton, 15 Lea (Tenn.) 14, 54 Am. Rep. 400.

[53] Burchinell v. Koon, 8 Colo. App. 463, 46 Pac. 932; Durant v. Pierson, 124 N. Y. 444, 26 N. E. 1095, 12 L. R. A. 146, 21 Am. St. 686.

[54] Bank of Port Gibson v. Baugh, 9 Smed. & M. (Miss.) 290.

[55] Springfield Grocer Co. v. Shackelford, 56 Mo. App. 642.

[56] Ramsbottom v. Bailey, 124 Cal. 259, 56 Pac. 1036.

[57] Jackson v. Gunton, 218 Pa. 275, 67 Atl. 467.

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ited by statute, a surviving partner may make a valid assignment of all the firm assets for the benefit of all firm creditors,[58] and prefer some of those creditors in such assignment.[59] And he may transfer the assets of the firm to one creditor in payment of his debt, although the effect of this would be to give that creditor a preference over other creditors.[60]

§ 622. **Payments to and by surviving partner.**—A surviving partner has no right to transfer firm assets in payment of his individual debts.[61] One who has taken firm property from a surviving partner in satisfaction of an individual debt, or as security for such debt is chargeable as a trustee therefor at the suit of the representatives of the deceased partner, or of the firm creditors.[62] If a survivor has conducted the business after dissolution payments made by him to one who is a creditor of both the old firm, and of the subsequent business, should be applied

[58] Espy v. Comer, 80 Ala. 333; Atchison v. Jones, 1 S. W. 406, 8 Ky. L. (abstract) 259; Riley v. Carter, 76 Md. 581, 25 Atl. 667, 19 L. R. A. 489, 35 Am. St. 443; Hanson v. Metcalf, 46 Minn. 25, 48 N. W. 441; Haynes v. Brooks, 116 N. Y. 487, 22 N. E. 1083 (affg. 42 Hun 528, 4 N. Y. St. 587); Hutchison v. Smith, 7 Paige (N. Y.) 26; Farmers' Bank v. Ritter (Pa.), 12 Atl. 659, 9 Sad. 433, 22 Wkly. Notes Cas. 128; White v. Union Ins. Co., 1 Nott & McC. (S. Car.) 556, 9 Am. Dec. 726; Davidson v. Papps, 28 Grant Ch. (U. C.) 91.

[59] Havens &c. Co. v. Harris, 140 Ind. 387, 39 N. E. 49; Emerson v. Senter, 118 U. S. 3, 6 Sup. Ct. 981, 30 L. ed. 49; Hoyt v. Sprague, 103 U. S. 613, 26 L. ed. 585; Tompkins v. Wheeler, 16 Pet. (U. S.) 106, 10 L. ed. 903; Brooks v. Marbury, 11 Wheat. (U. S.) 78, 9 L. ed. 423; Miller v. Pierson, 124 N. Y. 654, 27 N. E. 413 (revg. 58 Hun 190, 605, 11 N. Y. S. 842); Durant v. Pierson, 124 N. Y. 444, 26 N. E. 1095, 12 L. R. A. 146, 21 Am. St. 686; Haynes v. Brooks, 116 N. Y. 487, 22 N. E. 1083 (affg. 42 Hun 528, 4 N. Y. St. 587); Beste v. Burger, 110 N. Y. 644, 17 N. E. 734 (affg. 13 Daly 317, 17 Abb. N. Cas. 162); Williams v. Whedon, 109 N. Y. 333, 16 N. E. 365, 4 Am. St. 460 (affg. 39 Hun 98); Loeschigk v. Hatfield, 51 N. Y. 660; Egberts v. Wood, 3 Paige (N. Y.) 517, 24 Am. Dec. 236; Patton v. Leftwich, 86 Va. 421, 10 S. E. 686, 6 L. R. A. 569, 19 Am. St. 902.

[60] Salsbury v. Ellison, 7 Colo. 167, 2 Pac. 906, 49 Am. Rep. 347; Loeschigk v. Hatfield, 51 N. Y. 660. See Mills v. Argall, 6 Paige (N. Y.) 577.

[61] Hutchinson v. Smith, 7 Paige (N. Y.) 26; Knox v. Schepler, 2 Hill (S. Car.) 595; Allen v. Nashville Second Nat. Bank, 6 Lea (Tenn.) 558; Rogers v. Flournoy, 21 Tex. Civ. App. 556, 54 S. W. 386.

[62] Hill v. Draper, 54 Ark. 395, 15 S.

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to the earliest item of debt.[63] And if one who is a debtor to both the old firm and the subsequently conducted business makes payments to the surviving partner, these should be imputed also to the oldest item of the account.[64]

§ 623. Status of partnership real estate—Out and out conversion into personalty.—Questions as to the character of partnership real estate and as to whether it is converted into personalty arise most frequently after the death of a partner in connection with the rights of the surviving partner, and of the deceased partner's heirs and personal representatives. The rules of law on this subject have long been in some conflict in this country, and the general American rule has been opposed to the English doctrine. However, the Uniform Partnership Act changes the American rule in favor of the English doctrine. In view of these facts, although the subject was previously considered,[65] the conflicting general doctrines and the reasons assigned in support of each, will here be reviewed from the standpoint of rights after death of a partner. In England the rule is that whenever land is partnership property, it is treated as personal estate for all purposes, including the determination of the rights of heirs and personal representatives of deceased partners. This rule is now settled by the English Partnership Act,[66] and is applied in Scotland,[67] and the English-speaking British colonies.[68]

W. 1025; Brown v. Watson, 66 Mich. 223, 33 N. W. 493.

[63] Stanwood v. Owen, 14 Gray (Mass.) 195; Wiesenfeld v. Byrd, 17 S. Car. 106; Tootle v. Jenkins, 82 Tex. 29, 17 S. W. 519; Clayton's Case, 1 Merw. 572, 15 Rev. 161, 35 Eng. Reprint 781.

[64] Dick v. Laird, 5 Cranch C. C. 328, Fed. Cas. No. 3892; Boyd v. Webster, 59 N. H. 89; Cain v. Dietz, 3 Ohio Cir. Ct. R. 612, 2 O. C. D. 355.

[65] See ch. 11.

[66] English Partnership Act, §§ 20, 22.

[67] Young v. Campbell, 10 Fac. Dec. 196; Corse v. Corse, 13 Fac. Dec. 162; Murrays v. Murray, 13 Fac. Dec. 441; Irvine v. Irvine, 13 Sess. Cas. (2d Series) 1367.

[68] Ex parte Banks, 1 Newfoundland R. 349; Prentiss v. Brennan, 1 Gr. Ch. 484; Wylie v. Wylie, 4 Gr. Ch. 278; Sanborn v. Sanborn, 11 Gr. Ch. 359; Conger v. Platt, 25 U. C. Q. B. 277; Cameron v. Cameron, 1 N. Z. App. 24; In re Music Hall Block, 8 Ont. 225; In re Cushing's Estate, 1 New Bruns. Eq. 102; Walker v. Creaven, 25 N. Z. L. R. 329.

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The doctrine, however, was well settled by the decisions before the passage of the Partnership Act. The leading case is that of Darby v. Darby.[69] In which Vice-Chancellor Kindersley thus stated the reasons for the rule: "Now, it appears to me that, irrespective of authority, and looking at the matter with reference to principles well established in this court, if partners purchase land merely for the purpose of their trade, and pay for it out of the partnership property, that transaction makes the property personalty, and effects a conversion out and out. What is the clear principle of this court as to the law of partnership? It is, that on the dissolution of the partnership all the property belonging to the partnership shall be sold, and the proceeds of the sale, after discharging all the partnership debts and liabilities, shall be divided among the partners, according to their respective shares in the capital. That is the general rule; it requires no special stipulation; it is inherent in the very contract of partnership. That the rule applies to all ordinary partnership property is beyond all question, and no one partner has a right to insist that any particular part or item of the partnership property shall remain unsold, and that he shall retain his own share of it in specie. * * * The right of each partner to insist on a sale of all the partnership property, which arises from what is *implied in the contract of partnership,* is just as stringent as *a special contract* would be. If, then, this rule applies to ordinary stock-in-trade, why should it not apply to *all* kinds of partnership property? Suppose that partners, for the purpose of carrying on their business, purchase, out of the funds of the partnership, leasehold estate, or take a lease of land, paying the rent out of the partnership funds, can it be doubted that the same rule which applies to ordinary chattels would apply to such leasehold property? I do not think it was ever questioned that, on a dissolution, the right of each partner to have the partnership effects sold applies to leasehold property belonging to the partnership as much as to any other stock-in-trade. No one partner

[69] Darby v. Darby (1856), 3 Drew. 495.

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can insist on retaining his share unsold. Nor would it make any difference in whom the legal estate was vested, whether in one of the partners or in all; this court would regulate the matter according to the equities. * * * If, then, the rule applies not only to ordinary stock-in-trade, but also to a lease for years,—suppose next, that the partnership, instead of purchasing a term of years, were (whether from necessity or choice) to purchase land in fee; if the land is necessary for the partnership business, and bought with the partnership assets, what difference can it make whether the real estate bought is leasehold or in fee? Let it be once established that the property purchased is partnership property, and it then comes under the operation of those principles which arise out of the partnership contract; and there seems to be no reason why the operation of those principles is to be restricted to any particular class or species of partnership property. * * * Nor could it be material in this case, any more than on the purchase of a leasehold interest, in whom the legal estate was vested. I should, therefore, feel no hesitation in coming to this conclusion, that the mere contract of partnership, without any express stipulation, involves in it an implied contract, quite as stringent as if it were expressed, that, at the dissolution of the partnership, all the property then belonging to the partnership, whether it be ordinary stock-in-trade, or a leasehold interest, or a fee simple estate in land, shall be sold, and the net proceeds, after satisfying all the partnership debts and liabilities, be divided among the partners; and that each partner, and the representatives of any deceased partner, have a right to insist on this being done. Next, what is the doctrine of this court as to conversion? If a testator seized of real estate devises it for sale, and directs that the proceeds of the sale shall be divided among certain persons, so that each of the cestuis que trustent is entitled to say he will have it sold, and will take his share of the proceeds, that real estate is in equity converted into personalty; and so, if three persons contract that certain real property belonging to them shall be sold, and the proceeds be divided among them, so that each one of them has a right to insist

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that it shall be sold, and that he shall have his share of the proceeds *as money*, that real property is in equity converted into personalty, and if any one of them dies while the property remains unsold, his share is personalty as between his heir and his personal representatives. Now, if it be established that, by the contract of partnership, all the partnership property is to be sold at the dissolution of the partnership, then any real property which has become the property of the partnership becomes, by force of the partnership contract, converted into personalty; and that, not merely as between the partners, to the extent of discharging the partnership debts, but as between the real and personal representatives of any deceased partner." There were a few decisions[70] earlier than this one which laid down the rule of conversion only for partnership purposes and that a special contract was necessary to make an out and out conversion substantially the same doctrine followed by the greater number of American cases. There were also decisions earlier than that of Darby v. Darby, many of them by Lord Eldon, which favored the doctrine of out and out conversion, and on which the decision in Darby v. Darby was based.[71] The rule of out and out conversion had also, it seemed, always been followed in the cases which adhered closely to the law merchant.[72] Some of the earlier American decisions and texts followed the doctrine of out and

[70] Thornton v. Dixon, 3 Bro. C. C. 199; Bell v. Phyn, 7 Ves. 453; Balmain v. Shore, 9 Ves. 500; Randall v. Randall (1835), 7 Sim. 271; Darby v. Darby, 3 Drew. 495.

[71] Fereday v. Wightwick, 1 Russ. & Myl. 45; Crawshay v. Maule, 1 Swanst. 495; Kirkpatrick v. Lime, 5 Paton Scotch Ap. Cas. 525; Selkrig v. Davies, 2 Dow. 230; Phillips v. Phillips, 1 Myl. & K. 649; Broom v. Broom, 3 Myl. & K. 443.

[72] Jeffreys v. Small, 1 Vern. 217, Eq. Cas. Abr. 370, pl. 1; Lake v. Gibson, 1 Ch. Cas. Abr. 290, pl. 3, s. c. subnom.; Lake v. Craddock, 3 P. W. 158; Usher v. Ayleward, 1 Vern. 360, 361; Kempe v. Andrews, Carth. 170; Martin v. Crompe, 1 Ld. Raym. 340, 2 Salk. 444; Elliot v. Brown, 3 Swanst. 489; Lyster v. Dolland, 1 Ves. Jr. 431, 3 Bro. C. C. 478, 480; Morley v. Bird, 3 Ves. Jr. 628; Jackson v. Jackson, 9 Ves. 591, 596; Petty v. Styward, 1 Rep. Cas. in ch. 57, 1 Eq. Cas. Abr. 290; Rigden v. Vallier, 2 Ves. Sen. 252, 258; Steeds v. Steeds, L. R. 22 Q. B. D. 537, 541, 58 L. J. Q. B. 302.

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out conversion,[73] and in Texas,[74] Ohio,[75] Kentucky,[76] Connecticut,[77] and in some other states, statements favoring the rule are found in opinions.[78] It is generally held that lands owned by the partnership may be converted into personalty by agreement between the parties, either written,[79] or implied from the nature of the business, as selling real estate;[80] or from the acts of the partners in relation to the lands.[81] The former rule in Penn-

[73] Hoxie v. Carr, 1 Sumn. (U. S.) 173, Fed. Cas. No. 680 (1832); McAlister v. Montgomery, 3 Hayw. (Tenn.) 94; 3 Kent Com., pp. 37, 39; Story Eq. Jur. (1 ed) (1835), § 674.

[74] Baldwin v. Richardson, 33 Tex. 16.

[75] Sumner v. Hampson, 8 Ohio 328, 32 Am. Dec. 722; Ludlow v. Cooper, 4 Ohio St. 1; Rammelsberg v. Mitchell, 29 Ohio St. 22.

[76] Divine v. Mitchum, 4 B. Mon. (Ky.) 488, 41 Am. Dec. 241; Garth v. Davis, 120 Ky. 106, 85 S. W. 692, 27 Ky. L. 505, 117 Am. St. 571; Holmes v. Self, 79 Ky. 297, 2 Ky. L. (abstract) 322, 2 Ky. L. 380. Compare Galbraith v. Gedge, 16 B. Mon. (Ky.) 631; Carter v. Flexner, 92 Ky. 400, 17 S. W. 851, 13 Ky. L. 608.

[77] Sigourney v. Munn, 7 Conn. 11; Beecher v. Stevens, 43 Conn. 587; Dickinson v. Dickinson, 29 Conn. 600.

[78] Breen v. Richardson, 6 Colo. 605; Allen v. Withrow, 110 U. S. 119, 3 Sup. Ct. 517, 28 L. ed. 90; Claggett v. Kilbourne, 1 Black (U. S.) 346, 17 L. ed. 213; McKee v. Covalt, 71 Kans. 772, 81 Pac. 475; Merritt v. Dickey, 38 Mich. 41; Moran v. Palmer, 13 Mich. 367; Richardson v. Wyatt, 2 Desaus. Eq. (S. Car.) 471; Boyce v. Coster, 4 Strobh. Eq. (S. Car.) 25; Betts v. Letcher, 1 S. Dak. 182, 46 N. W. 193; Comp. Laws Utah, § 3918; Rice v. Barnard, 20 Vt. 479, 50 Am. Dec. 54; Zane v. Sawtell, 11 W. Va. 43; Makee v. Dominis, 3 Haw. 579.

[79] Rovelsky v. Brown, 92 Ala. 522, 9 So. 182, 25 Am. St. 83; Davis v. Smith, 82 Ala. 198, 2 So. 897; Ferris v. Van Ingen, 110 Ga. 102, 35 S. E. 347; Nicoll v. Ogden, 29 Ill. 323, 81 Am. Dec. 311; Maddock v. Astbury, 32 N. J. Eq. 181; Darrow v. Calkins, 154 N. Y. 503, 49 N. E. 61, 48 L. R. A. 299, 61 Am. St. 637 (affg. 6 App. Div. 28, 39 N. Y. S. 527); Greene v. Greene, 1 Ohio 535.

[80] Smith v. Burnham, 3 Sumn. (U. S.) 435, Fed. Cas. 13019; Claggett v. Kilbourne, 1 Black (U. S.) 346, 17 L. ed. 213; Holliday v. Land & River Imp. Co., 57 Fed. 774, 6 C. C. A. 560; Patrick v. Patrick, 71 N. J. Eq. 347, 63 Atl. 848; Buckley v. Doig, 188 N. Y. 238, 80 N. E. 913; Sumner v. Hampson, 8 Ohio 328, 32 Am. Dec. 722; Flower v. Barnekoff, 20 Ore. 132, 25 Pac. 370, 11 L. R. A. 149; Boyce v. Coster, 4 Strobh. Eq. (S. Car.) 25; Case v. Seger, 4 Wash. 492, 30 Pac. 646.

[81] Allen v. Withrow, 110 U. S. 119, 3 Sup. Ct. 517, 28 L. ed. 90; Sprague Mfg. Co. v. Hoyt, 29 Fed. 421; Rammelsberg v. Mitchell, 29 Ohio St. 22; Ludlow v. Cooper, 4 Ohio St. 1; Wilson v. Wilson, 74 S. Car. 30, 54 S. E. 227.

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sylvania was that such a conversion must be made by a deed or writing placed on record.[82]

§ 624. Status of partnership real estate—Conversion into personalty for partnership purposes only.—As a general rule American courts hold that firm real estate is converted into personalty so far as is necessary to pay firm debts.[83] It is also the

[82] Hale v. Henrie, 2 Watts (Pa.) 143, 27 Am. Dec. 289; McDermot v. Laurence, 7 Serg. & R. (Pa.) 438; Connelly v. Withers, 9 Lanc. Bar. 117; Cundey v. Hall, 208 Pa. 335, 57 Atl. 761, 101 Am. St. 938; In re Shafer's Appeal, 106 Pa. St. 49; Hayes v. Treat, 178 Pa. St. 310, 35 Atl. 987; Moore v. Wood, 171 Pa. St. 365, 33 Atl. 63; Collner v. Greig, 137 Pa. St. 606, 20 Atl. 938, 21 Am. St. 899; Kepler v. Erie Dime Savings Bank, 101 Pa. St. 602; In re Second Nat. Bank's Appeal, 83 Pa. St, 203; Meily v. Wood, 71 Pa. St. 488, 10 Am. Rep. 719; Ebbert's Appeal, 70 Pa. St. 79; Kramer v. Arthurs, 7 Pa. St. 165.

[83] Lang's Heirs v. Waring, Survivor, 25 Ala. 625, 60 Am. Dec. 533; Murphy v. Abrams, 50 Ala. 293; Butts v. Cooper, 152 Ala. 375, 44 So. 616; Clagett v. Kilbourne, 1 Black (U. S.) 346, 17 L. ed. 213; Riddle v. Whitehill, 135 U. S. 621, 10 Sup. Ct. 924, 34 L. ed. 283; Bates v. Babcock, 95 Cal. 479, 30 Pac. 605, 16 L. R. A. 745, 29 Am. St. 133; Dupuy v. Leavenworth, 17 Cal. 262; Bank of S. W. Georgia v. McGarrah, 120 Ga. 944, 48 S. E. 393 (applying Ga. Code, § 2649); Taylor v. McLaughlin, 120 Ga. 703, 48 S. E. 203; Black v. Black, 15 Ga. 445; Trowbridge v. Cross, 117 Ill. 109, 7 N. E. 347; Meridian Nat. Bank v. Brandt, 51 Ind. 56; Roberts v. McCarty, 9 Ind. 16, 68 Am. Dec. 604; Paige v. Paige, 71 Iowa 318, 32 N. W. 360, 60 Am. Rep. 799; Hewitt v. Rankin, 41 Iowa 35; McKee v. Covalt, 71 Kans. 772, 81 Pac. 475; Buffum v. Buffum, 49 Maine 108, 77 Am. Dec. 249; Dyer v. Clark, 5 Met. (Mass.) 562, 39 Am. Dec. 697; Way v. Stebbins, 47 Mich. 296, 11 N. W. 166; Woodward-Holmes Co. v. Nudd, 58 Minn. 236, 59 N. W. 1010, 27 L. R. A. 340, 49 Am. St. 503; Hanway v. Robertshaw, 49 Miss. 758 (1876); Young v. Thrasher, 115 Mo. 222, 21 S. W. 1104; Smith v. Jones, 18 Nebr. 481, 25 N. W. 624; Jones v. Beekman (N. J.), 47 Atl. 71; Craighead v. Pike, 58 N. J. Eq. 15, 43 Atl. 424 (affd. 60 N. J. Eq. 443, 45 Atl. 1091); Smith v. Jackson, 2 Edw. Ch. (N. Y.) 28; Buchan v. Sumner, 2 Barb. Ch. (N. Y.) 165, 47 Am. Dec. 305; Greenwood v. Marvin, 111 N. Y. 423, 19 N. E. 228; Fairchild v. Fairchild, 64 N. Y. 471; Smith v. Cowles, 81 App. Div. 328, 81 N. Y. S. 524; Stroud v. Stroud, 61 N. Car. 525 (applying Code, ch. 43, § 2, now Rev. Stat. (1905), ch. 33, § 1579); Adams v. Church, 42 Ore. 270, 70 Pac. 1037, 59 L. R. A. 782, 95 Am. St. 740; McAlister v. Montgomery, 3 Hayw. (Tenn.) 94; Piper v. Smith, 1 Head (Tenn.) 93; State v. Neal, 29 Wash. 391, 69 Pac. 1103; Cunningham v. Ward, 30 W. Va. 572, 5 S. E. 646; Weld v. Johnson Mfg. Co., 86 Wis. 552, 57 N. W. 374; Martin v. Morris, 62 Wis. 418, 22 N. W. 525; Aldrich v. Robinson, 2 Haw. 606.

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general rule adhered to by American courts that lands which have been treated by the partners as firm property, are treated by courts as firm property and so far considered as personalty, that they may be sold to the extent which is necessary for paying firm debts and the adjustment of equities between the partners.[84] It is often held that the intention with which real property is purchased by a firm, and not the use to which it is put, determines the question whether it shall be deemed real or personal property.[85] But some courts hold there is a presumption

[84] Gillett v. Gaffney, 3 Colo. 351; Breen v. Richardson, 6 Colo. 605; McCauley v. Fulton, 44 Cal. 355; Dupuy v. Leavenworth, 17 Cal. 262; Price v. Hicks, 14 Fla. 565; Robertson v. Baker, 11 Fla. 192; Loubat v. Nourse, 5 Fla. 350; Bopp v. Fox, 63 Ill. 540; Faulds v. Yates, 57 Ill. 416, 11 Am. Rep. 24; Mauck v. Mauck, 54 Ill. 281; Hyman v. Peters, 30 Ill. App. 134; Dickey v. Shirk, 128 Ind. 278, 27 N. E. 733; Walling v. Burgess, 122 Ind. 299, 22 N. E. 419, 23 N. E. 1076, 7 L. R. A. 481; Johnson v. Clark, 18 Kans. 157; Buffum v. Buffum, 49 Maine 108, 77 Am. Dec. 249; Fall River Whaling Co. v. Borden, 10 Cush. (Mass.) 458; Merritt v. Dickey, 38 Mich. 41; Moran v. Palmer, 13 Mich. 367; Quinn v. Quinn, 22 Mont. 403, 56 Pac. 824; Thorne v. Bowen, 13 Nebr. 445, 14 N. W. 155; Bowen v. Billings, 13 Nebr. 439, 14 N. W. 152; Foster v. Sargent, 72 N. H. 170, 55 Atl. 423; Cilley v. Huse, 40 N. H. 358; Jarvis v. Brooks, 27 N. H. 37, 59 Am. Dec. 359; Baldwin v. Johnson, 1 N. J. Eq. 441; Deveney v. Mahoney, 8 C. E. Gr. (N. J.) 247; Van Brocklen v. Smeallie, 140 N. Y. 70, 35 N. E. 415, 55 N. Y. St. 263 (revg. 64 Hun 467, 46 N. Y. St. 230); Fairchild v. Fairchild, 64 N. Y. 471; Dawson v. Parsons, 10 Misc. 428, 31 N. Y. S. 78, 63 N. Y. St. 320; Delmonico v. Guillaume, 2 Sandf. Ch. (N. Y.) 366; Sage v. Sherman, 2 N. Y. 417; Sparger v. Moore, 117 N. Car. 449, 23 S. E. 359; Baird v. Baird, 21 N. Car. 524, 31 Am. Dec. 399; Page v. Thomas, 43 Ohio St. 38, 1 N. E. 79, 54 Am. Rep. 788; Sumner v. Hampson, 8 Ohio 328, 32 Am. Dec. 722; Ludlow v. Cooper, 4 Ohio St. 1; Greene v. Greene, 1 Ohio 535; Rammelsberg v. Mitchell, 29 Ohio St. 22; Abbott's Appeal, 50 Pa. St. 234; Lime Rock Bank v. Phetteplace, 8 R. I. 56; Tillinghast v. Champlin, 4 R. I. 173, 67 Am. Dec. 510; Wilson v. Wilson, 74 S. Car. 30, 54 S. E. 227; Richardson v. Wyatt, 2 Des. Eq. (S. Car.) 471; Winslow v. Chiffelle, Harp. Eq. (S. Car.) 25; Betts v. Letcher, 1 S. Dak. 182, 46 N. W. 193; McAlister v. Montgomery, 3 Hay (Tenn.) 94; Boyers v. Elliott, 7 Humph. (Tenn.) 204; Hunt v. Benson, 2 Humph. (21 Tenn.) 459; Baldwin v. Richardson, 33 Tex. 16; Diggs v. Brown, 78 Va. 292; Washburn v. Washburn, 23 Vt. 576; Zane v. Sawtell, 11 W. Va. 43; Riedeburg v. Schmitt, 71 Wis. 644, 38 N. W. 336; Fowler v. Bailley, 14 Wis. 125; Bird v. Morrison, 12 Wis. 138; Makee v. Dominis, 3 Haw. 579.

[85] Holmes v. Self, 79 Ky. 297, 2

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that land deeded to partners is held by them as tenants in common, individually, and one who claims such land to be part of the firm assets must offer evidence to overcome such presumption,[86] which, it is held in some jurisdictions, may be done by proof that the lands were bought with partnership money,[87] in others, by proof that the lands were bought for the partnership and used in partnership business.[88] It follows as a result of this theory of partial conversion that whatever remains of partnership lands or of their proceeds after all partnership debts have been paid and the equities between partners have been adjusted, retains the character of realty and passes as such.[89] The reason

Ky. L. (abstract) 322, 2 Ky. L. 380. See also Hiscock v. Phelps, 44 N. Y. 97; Lane v. Tyler, 49 Maine 252; Ludlow v. Cooper, 4 Ohio St. 1; Providence v. Bullock, 14 R. I. 353.

[86] Lang v. Waring, 17 Ala. 145; Brewer v. Browne, 68 Ala. 210; Hartnett v. Stillwell, 121 Ga. 386, 49 S. E. 276, 104 Am. St. 151; Thompson v. Holden, 117 Mo. 118, 22 S. W. 905; Tregea v. Mills, 11 Wyo. 438, 72 Pac. 578, 73 Pac. 209.

[87] Morrill v. Colehour, 82 Ill. 618; Bopp v. Fox, 63 Ill. 540; Evans v. Hawley, 35 Iowa 83; Quinn v. Quinn, 22 Mont. 403, 56 Pac. 824, Rev. Code, § 5473 (Civil Code, § 3195); Jarvis v. Brooks, 27 N. H. 37, 59 Am. Dec. 359; Hill v. Beach, 1 Beas. (12 N. J. Eq.) 31; Smith v. Jackson, 2 Edw. Ch. (N. Y.) 28; Collumb v. Read, 24 N. Y. 505; King v. Weeks, 70 N. Car. 372; Col. Civil Code, § 2406; North Dak. Civil Code, § 5826; South Dak. Civil Code, § 1731.

[88] Pugh v. Currie, 5 Ala. 446; Bank of S. W. Georgia v. McGarrah, 120 Ga. 944, 48 S. E. 393; Chandler v. Jessup, 132 Ind. 351, 31 N. E. 1109; Morgan v. Olvey, 53 Ind. 6; Fordyce v. Hicks, 80 Iowa 272, 45 N. W. 750; Crooker v. Crooker, 46 Maine 250; Richards v. Manson, 101 Mass. 482; Burnside v. Merrick, 4 Met. (Mass.) 537; Arnold v. Wainwright, 6 Minn. 358, 80 Am. Dec. 448; Whitney v. Cotten, 53 Miss. 689; Alexander v. Kimbro, 49 Miss. 529; Sykes v. Sykes, 49 Miss. 190; Willet v. Brown, 65 Mo. 138, 27 Am. Rep. 265; Parker v. Bowles, 57 N. H. 491; Coles v. Coles, 15 Johns. (N. Y.) 159, 8 Am. Dec. 231; Buckley v. Buckley, 11 Barb. (N. Y.) 43; Smith v. Cowles, 81 App. Div. 328, 81 N. Y. S. 524; Patton v. Patton, 60 N. Car. 572, 86 Am. Dec. 448, Win. Eq. 20; Dodson v. Dodson, 26 Ore. 349, 37 Pac. 542; Providence v. Bullock, 14 R. I. 353.

[89] Espy v. Comer, 76 Ala. 501; Power v. Robinson, 90 Ala. 225, 8 So. 10; Shanks v. Klein, 104 U. S. 18, 26 L. ed. 635; Percifull v. Platt, 36 Ark. 456; Matlock v. Matlock, 5 Ind. 403; Hewitt v. Rankin, 41 Iowa 35; Galbraith v. Gedge, 16 B. Mon. (Ky.) 631; Dyer v. Clark, 5 Met. (Mass.) 562, 39 Am. Dec. 697; Comstock v. McDonald, 126 Mich. 142, 85 N. W. 579; Scruggs v. Blair, 44 Miss. 406; Uhler v. Semple, 20 N. J. Eq. 288; Buchan v. Sumner, 2 Barb. Ch. (N. Y.) 165, 47 Am. Dec. 305; Greenwood v. Marvin, 111 N.

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for so holding is thus stated in the leading case:[90] "In Wilcox v. Wilcox,[90a] it was held that where after all debts and balances between the partners are satisfied, there remains real estate of the copartnership, in which the legal title of each partner corresponds to his interest or share in the partnership, equity will not interfere for the purpose of converting such real estate into personalty. In the present case the legal title does not correspond with the beneficial interests of the several partners. Not only are the shares of the partners unequal under the partnership agreements, but much of the real estate is held without regard to the beneficial interest, either in the sole name of Paine, or otherwise, as convenience suggested at the time of purchase. Assuming that the force of the decision in Wilcox v. Wilcox is to be limited to the precise state of facts there presented, the question now is whether its principle extends to cases where a proper adjustment of the rights of the partners is not secured by descent of the legal title, but requires the voluntary recognition or judicial determination of equitable rights more extensive than the legal title. That decision proceeded upon the ground that the application of the principles of implied trusts to the real estate of partnerships constituted the whole foundation and the origin of the doctrine of equitable conversion; and that those trusts are to be administered solely for the purpose of enforcing the obligations and securing the rights of the partners, as between themselves. When the legal title is held by one partner in excess of his beneficial interest, it is held in trust for the purposes of the partnership, and is chargeable, in equity, with all obligations growing out of that relation. Against such party, and against his widow and heirs, equity will interpose to secure to his copartners their actual beneficial interest. Neither the ground of interposition nor the mode of its exercise is changed by the decease of the party in whose behalf it is required. His representatives are substituted in his place. Their

Y. 423, 19 N. E. 228; Martin v. Morris, 62 Wis. 418, 22 N. W. 525; Ga. Code, § 2649.

[90] Shearer v. Shearer, 98 Mass. 107.

[90a] 13 Allen (Mass.) 252.

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rights are derivative merely. Equities between them, if any there be, are subordinate and posterior to those which spring from the relation of copartnership. The conversion of real estate into personalty is worked, if at all, for the purpose of adjusting the affairs of the partnership. It would seem, therefore, that the conversion should be made only when and so far as required for that purpose; and that the effect upon the descent or distribution of the share of a deceased partner among his representatives should be regarded as incidental merely, and not an end for which the interference of a court of equity is to be sought. In this view of the grounds and purposes of such equitable conversion, even regarding all partnership real estate, however the legal title may be held, as held in trust for the partnership, this court are disposed to hold, notwithstanding the great weight of authority to the contrary elsewhere, that such real estate is to be converted into personalty only when such conversion is required for the payment of claims against the partnership which are in the nature of debt. Balances due to individual partners, for advances to the firm, or for payments made in its behalf, come within this definition. So also may capital, furnished by one partner, when by the terms upon which it was furnished, or from the nature and necessity of the case, it is to be repaid in specific amounts, in order to reach the net result, or body of the partnership interests, to which the proportional rights or shares of the several partners attach. In short, whatever is required to be paid or measured in precise sums must be so adjusted; and real estate, converted for that purpose, undoubtedly becomes personalty, and is to be distributed as such when paid over to the party entitled. But the shares in the body of the partnership property, those interests which not measured by precise amounts, but consist in a common proprietorship after all special claims are satisfied, stand upon different footing. These interests are determined by the proportions fixed by the articles or organic law of the partnership. When the beneficial interests and the legal title correspond, it has already been decided that the rights of the partners in real estate so held will be left to

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adjust themselves by the descent of the legal title, with its incidents, as real estate of the several partners, held in common.[90b] When the legal title is otherwise held, it is held in trust; and the equitable title descends in like manner and with like incidents, except as to dower. The office of equity in such case is merely to declare the trusts, and compel the legal title to serve the equitable interests. This is accomplished by directing such conveyances as will make the legal title of the several parties conform to their respective beneficial interests. By the rule above indicated, all partnership rights and obligations are secured, and all equities growing out of that relation are met and answered. To require equitable interference to go further, and convert all real estate into personalty, for the mere purpose of a division, seems to us to be an unnecessary invasion of the rights of the copartners, and, when undertaken in the interest of one class of the representatives of a deceased partner, against another class of representatives of the same partner, it seems to be a departure from the legitimate sphere of equitable jurisdiction. It is not the province of equity to seek to counteract or modify the operation of the laws of descent and distribution. The widow's right of dower in her husband's interest in partnership real estate, is not held subject to the payment of his private debts. As a general fact, this incident makes dower a more valuable interest than the distributive share of the widow would be if the real estate were to be converted. But we do not regard that circumstance as of any weight in determining the general rule against such conversion. On the other hand, in our view, the special facts, which, in the present case, would make it more advantageous for the widow that the partnership realty should be converted into personal estate, furnish no ground for such conversion. The equitable powers of the court are not called into exercise for the settlement of the estate of the deceased partner. There are no equities between heirs and distributees, under our laws, which can call into exercise or quicken the powers of the court for the conversion of realty into personalty."[91]

[90b] Citing Wilcox v. Wilcox, 13 Allen (Mass.) 252.

[91] The court said further, in discussing some arguments in favor of

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§ 625. Status of partnership real estate—Time when conversion takes place.—The general holding is that real property of a partnership is changed into personalty upon being

the other rule: "We do not understand that, in the English courts, any such supposed equities have ever been made a ground for the doctrine of equitable conversion, as held there. In the case of Cookson v. Cookson, 8 Sim. 529, such a ground of interference was emphatically discarded. That case, however, is not one in which the full extent of the English doctrine was asserted. Conversion into personalty is not necessary to enable creditors of the individual partner to secure payment of their debts out of the share of their debtor in real estate held in copartnership. By our laws, all property of a debtor, whether personal or real, is liable for payment of all his debts. Creditors, therefore, require no equitable interposition, except such as may be necessary for the assertion of the partner himself. Their rights are secured, in respect to real estate held in copartnership, through the equities which pertain to their debtor. In this particular the laws of England differ. The inheritance there, being exempt from liability for debts by simple contract, it is only by conversion and payment of the proceeds to the personal representatives of a deceased partner that his private creditors can receive payment out of such property. How far, if at all, this consideration may have been influential in determining the extent to which the doctrine of equitable conversion should be carried, and in establishing the right of the personal representative to require it to be made in his favor, we are unable to judge. The cases in which the personal representative of a deceased partner has been held entitled to enforce this right against the heir, do not indicate, so far as we have been able to examine them, whether it is done in behalf of creditors or of distributees. The doctrine, however, seems now to be fully established, without regard to the consideration whether there are private creditors or not. Darby v. Darby, 3 Drewry 495. This may perhaps be regarded as the most natural result of the rule holding such property liable for the payment of all partnership obligations, when it is considered how far that liability deprived partnership real estate of the fixedness and permanency of ownership which characterize the inheritance in realty there. We can not dismiss the subject without adverting to some of the considerations upon which the rule of conversion 'out and out' is maintained in the case last cited, and which have been pressed in the argument before us. One reason for such conversion is said to be that courts know no mode of estimating the property, and making division of the shares between the partners, except by sale and reduction to money; and, furthermore, that one partner has no right to claim, and can not be required to accept, his share of the capital or profits in the form of an undivided interest in specific property. But this assumes the whole question. In relation to personal property, there is a practical

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difficulty in this respect. The law recognizes it, and, upon the death of one partner, vests the whole title in the survivor. Even during the continuance of the copartnership, one partner may transfer the entire title of the firm by sale of any of its personal property in the course of its business. In regard to such property, the rule that it is to be in all cases converted into money is undoubtedly well established and entirely uniform everywhere. In this, equity follows the analogies of the law. On the other hand, neither partner can convey the interest of his copartner in real estate. The law provides for its transmission in undivided shares; for its partition; for its descent to the heirs of a deceased partner. It seems to us best to accord with the general principles of equitable interference that equity should recognize the division of real estate held by copartners as already effected by operation of law, unless and except so far as the terms of the copartnership and the state of the accounts require its interposition in order to make the legal title conform to the equitable or beneficial interest. When this is accomplished, equity has no longer any office to perform toward it. Again, it is said 'that the mere contract of partnership, without any express stipulation, involves in it an implied contract quite as stringent as if it were expressed, that, at the dissolution of the partnership, all the property then belonging to the partnership, whether it be ordinary stock-in-trade, or a leasehold interest, or a fee-simple estate in land, shall be sold, and the net proceeds, after satisfying all the partnership debts and liabilities, be divided among the partners; and that each partner and the representatives of any deceased partner have a right to insist on this being done.' In our view, there are several objections to such an implication of agreement, as the foundation of a rule of equitable conversion. In the first place, it seems necessary to assume in the outset that such is the established rule, and that parties are to be presumed to become partners in reference to its operation, in order to predicate such an inference from the mere fact of engaging in a joint business. It would be especially difficult, without such assumption, to find a pretext for the inference, where the parties have entered into written articles and omitted all provision of that character. If the inference of such an agreement is to be made as part of the transaction of purchasing real estate with partnership funds, for partnership use, it is equally inconsistent with the failure to express such a term in the deed of conveyance. The inconsistency is even greater than that; for, by the express terms of the deed and by the well-known operation of law, the estate is limited to the heirs of the several copartners, whose estate is, at law, the ordinary one of tenants in common. In the second place, conceding the agreement as supposed, either express (provided it be not in writing) or implied, it is not such a contract as entitled the parties to a specific performance, and it does not create the trust required for the conversion of real estate. The statute demands a written agreement for that purpose. Gen. Stats., ch. 100, § 19. The English statute seems equally to require it. The implied trust, which is enforced in equity for the adjustment of partnership obligations, results

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acquired by the firm, and that portion of it not required to be sold in the adjustment of partnership affairs, becomes reconverted into real estate after settlement.[92] Some courts state that the legal title is held by the partners in trust for the adjustment and settlement of partnership debts and equities, and that until such adjustment is had and the trust carried out, no rights of

from the investment of the funds of the partnership in the real estate in question, for the use of the partnership. Regarding it in that light, the court have but to inquire to what use the funds, represented in the land, are devoted; to whom and in what proportions the beneficial interests belong; and the execution of the trust will follow according to the nature of the rights to be secured. It is not necessary to resort to inventions to work out the equities of the case through some implied contract, or supposed intentions of the parties in entering into the relation of partnership, or in applying it to the ownership of land. The ordinary, well-known and generally recognized principles of equity, as applied to trusts resulting by implication of law, are sufficient for all the requirements of that relation. We are satisfied that the principles which we have indicated apply equally to every condition in which the legal title may be placed, and to every degree and proportion of interest to which the several partners may be entitled. It was the right of the surviving partner to apply partnership funds for the liquidation of any obligations of the firm, and for the discharge of all liens upon the joint property. The payment of money to release partnership real estate from incumbrances which existed thereon at the time of its purchase, although not a debt which they were otherwise bound to pay, was in accordance with the rights and interests of the copartners, as such, and might properly be done as a part of the adjustment of the partnership affairs before division. We do not see that the plaintiff, either as widow or as administratrix, can claim to have such real estate interest converted back again into personalty. The bonds, or contracts for the purchase of real estate, may properly be fulfilled; and, if fulfilled by a conveyance according to their terms, or if specifically enforced, the rights of the widow and heirs in the land thereby acquired attach in the same manner as if the land had been conveyed in the lifetime of the deceased partner. Reed v. Whitney, 7 Gray (Mass.) 533.

[92] Lenow v. Fones, 48 Ark. 557, 4 S. W. 56; French v. Vanatta, 83 Ark. 306, 104 S. W. 141, 8 Columbia L. Rev. 208; Coolidge v. Burke, 69 Ark. 237, 62 S. W. 583; Simpson v. Leech, 86 Ill. 286; Bopp v. Fox, 63 Ill. 540; Manuck v. Manuck, 54 Ill. 281; Huston v. Neil, 41 Ind. 504; Paige v. Paige, 71 Iowa 318, 32 N. W. 360, 60 Am. Rep. 799; Evans v. Hawley, 35 Iowa 83; McKee v. Covalt, 71 Kans. 772, 81 Pac. 475; Crooker v. Crooker, 46 Maine 250; Comstock v. McDonald, 126 Mich. 142, 85 N. W. 579; Woodward-Holmes Co. v. Nudd, 58 Minn. 236, 59 N. W. 1010, 27 L. R. A. 340, 49 Am. St. 503; Sykes v. Sykes, 49

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heirs, or of dower or homestead can attach.[93] But other courts hold that the remainder of partnership lands which is not needed in partnership adjustments, has never lost its status as real estate while owned by the firm,[94] and where such is the rule the wife of a partner is at all times a necessary party to the conveyance of partnership lands, and the widow of a deceased partner to

Miss. 190; Scruggs v. Blair, 44 Miss. 406; Young v. Thrasher, 115 Mo. 222, 21 S. W. 1104; Uhler v. Semple, 20 N. J. Eq. 288; Fairchild v. Fairchild, 64 N. Y. 471; Hauptmann v. Hauptmann, 91 App. Div. 197, 86 N. Y. S. 427; Dawson v. Parsons, 10 Misc. 428, 63 N. Y. St. 320, 31 N. Y. S. 78; Griffey v. Northcutt, 5 Heisk. (Tenn.) 746; Aldrich v. Robinson, 2 Haw. 606; Ga. Code, § 2649.

[93] Shanks v. Klein, 104 U. S. 18, 26 L. ed. 635; Schlichter Jute Cordage Co. v. Mulqueen, 142 Fed. 583; Hoxie v. Carr, 1 Sum. (U. S.) 173; Cole v. Mette, 65 Ark. 503, 47 S. W. 407, 67 Am. St. 945; Dupuy v. Leavenworth, 17 Cal. 262; Gillett v. Gaffney, 3 Colo. 351; Robertson v. Baker, 11 Fla. 192; Loubat v. Nourse, 5 Fla. 350; Hartnett v. Stillwell, 121 Ga. 386, 49 S. E. 276, 104 Am. St. 151; Trowbridge v. Cross, 117 Ill. 109, 7 N. E. 347; Dickey v. Shirk, 128 Ind. 278, 27 N. E. 733; Barkley v. Tapp, 87 Ind. 25; Henry v. Anderson, 77 Ind. 361; Hoyt v. Hoyt, 69 Iowa 174, 28 N. W. 500; Drake v. Moore, 66 Iowa 58, 23 N. W. 263; Hewitt v. Rankin, 41 Iowa 35; Johnson v. Clark, 18 Kans. 157; Galbraith v. Gedge, 16 B. Mon. (Ky.) 631; Dyer v. Clark, 5 Met. (Mass.) 562, 39 Am. Dec. 697; Michigan Trust Co. v. Chapin, 106 Mich. 384, 64 N. W. 334, 58 Am. St. 490; Arnold v. Wainwright, 6 Minn. 358, 80 Am. Dec. 448; Whitney v. Cotten, 53 Miss. 689; Matthews v. Hunter, 67 Mo. 293; Messer v. Messer, 59 N. H. 375; Partridge v. Wells, 3 Stew. (30 N. J. Eq.) 176, affd. 31 N. J. Eq. 362; Greenwood v. Marvin, 111 N. Y. 423, 19 N. E. 228; Fairchild v. Fairchild, 64 N. Y. 471; Rank v. Grote, 50 N. Y. Super. Ct. 275 (affd. 110 N. Y. 12, 17 N. E. 665); Tarbel v. Bradley, 7 Abb. N. Cas. 273 (affd. 86 N. Y. 280); Coles v. Coles, 15 Johns. (N. Y.) 159, 8 Am. Dec. 231; Maloy v. Associated Lace Makers Co., 55 Hun 604, 8 N. Y. S. 815, 30 N. Y. St. 153; Johnson v. Donvan, 50 Hun 215, 2 N. Y. S. 858, 20 N. Y. St. 30; King v. Weeks, 70 N. Car. 372; Greene v. Greene, 1 Ohio 535; Moderwell v. Mullison, 21 Pa. St. 257; Tillinghast v. Champlin, 4 R. I. 173, 67 Am. Dec. 510; Hunt v. Benson, 2 Humph. (Tenn.) 459; Dewey v. Dewey, 35 Vt. 555; Hopkins v. Prichard, 51 W. Va. 385, 41 S. E. 347; Bergeron v. Richardott, 55 Wis. 129, 12 N. W. 384; Bird v. Morrison, 12 Wis. 138.

[94] Powers v. Robinson, 90 Ala. 225, 8 So. 10; Blanchard v. Floyd, 93 Ala. 53, 9 So. 418; Percifull v. Platt, 36 Ark. 456; McCauley v. Fulton, 44 Cal. 355; Hanway v. Robertshaw, 49 Miss. 758; Holmes v. McGee, 27 Mo. 597; Tattersall v. Nevels, 77 Nebr. 843, 110 N. W. 708; Smith v. Jackson, 2 Edw. Ch. (N. Y.) 28; Ferguson v. Hass, Phil. Eq. (62 N. Car.) 113.

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an action for their sale.[95] But where the rule obtains of conversion upon the acquisition of lands by a partnership, or of holding in trust for firm purposes, wives or widows of partners are not necessary parties to a conveyance or action for sale.[96]

§ 626. Rights of surviving partner in firm real estate.—In the application of the rules announced in preceding sections there has arisen conflict in many details. Although the surviving partner takes the legal title to all the personal assets of the firm, the general rule is that he takes only an equitable title to firm real estate, and if necessary in order to pay firm debts and settle partnership accounts, he has the power to sell such real estate, his deed conveying only an equity to the purchaser, who has the power to compel the holder of the legal title to convey it.[97] The

[95] Pugh v. Currie, 5 Ala. 446; Brewer v. Browne, 68 Ala. 210; Butts v. Cooper, 152 Ala. 375, 14 So. 616; Duhring v. Duhring, 20 Mo. 174; Smith v. Jackson, 2 Edw. Ch. (N. Y.) 28; Huber v. Case, 93 App. Div. 479, 87 N. Y. S. 663.

[96] Drewry v. Montgomery, 28 Ark. 256; Welch v. McKenzie, 66 Ark. 251, 50 S. W. 505; Loubat v. Nourse, 5 Fla. 350; Ferris v. Van Ingen, 110 Ga. 102, 35 S. E. 347; Bopp v. Fox, 63 Ill. 540; Simpson v. Leech, 86 Ill. 286; Huston v. Neil, 41 Ind. 504; Dickey v. Shirk, 128 Ind. 278, 27 N. E. 733; Hewitt v. Rankin, 41 Iowa 35; Woodward-Holmes Co. v. Nudd, 58 Minn. 236, 59 N. W. 1010, 27 L. R. A. 340, 49 Am. St. 503; Sage v. Sherman, 2 N. Y. 417; Tarbel v. Bradley, 7 Abb. N. Cas. (N. Y.) 273 (affd. 86 N. Y. 280); Greenwood v. Marvin, 111 N. Y. 423, 19 N. E. 228; Dawson v. Parsons, 10 Misc. 428, 31 N. Y. S. 78, 63 N. Y. St. 320; Hauptmann v. Hauptmann, 91 App. Div. 197, 86 N. Y. S. 427; Meily v. Wood, 71 Pa. 488, 10 Am. Rep. 719.

[97] See ante, § 617. See also Shanks v. Klein, 104 U. S. 18, 26 L. ed. 635; Schlichter Jute Cordage Co. v. Mulqueen, 142 Fed. 583; Hartnett v. Stillwell, 121 Ga. 386, 49 S. E. 276, 104 Am. St. 151 (applying § 2649, code 1895); Walling v. Burgess, 122 Ind. 299, 22 N. E. 419, 23 N. E. 1076, 7 L. R. A. 481; Steinberg v. Larkin, 58 Kans. 201, 48 Pac. 861, 37 L. R. A. 195; Johnson v. Clark, 18 Kans. 157; Merritt v. Dickey, 38 Mich. 41; Hanway v. Robertshaw, 49 Miss. 758; Delmonico v. Guillaume, 2 Sandf. Ch. (N. Y.) 366; Sparger v. Moore, 117 N. Car. 449, 23 S. E. 359; Tillinghast v. Champlin, 4 R. I. 173, 67 Am. Dec. 510; Williamson v. Fontain, 7 Baxt. (Tenn.) 212; Weld v. Johnson Mfg. Co., 86 Wis. 552, 57 N. W. 374. See generally case note Am. Cas. 1912 D, 1207; Roulston v. Washington, 79 Ala. 529 (1885); Duryea v. Burt, 28 Cal. 569 (1865); French v. Vanatta, 83 Ark. 306, 104 S. W. 141; Breen v. Richardson, 6 Colo. 605 (1883); Shanks v. Klein, 104 U. S. 18, 26 L. ed. 635; Clay v. Field, 34 Fed. 375

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surviving partner has the full right of possession of the partnership lands for the purposes of winding up the business.[98] The surviving partner can not sell real estate unless necessary to pay debts or settle partnership affairs.[99] A purchaser of land from a surviving partner, with notice that it was partnership property, is bound to know the authority of such partner as to its sale.[1] As a general rule where land is purchased by partners for partnership purposes and the conveyance is made to all the partners,

(mod. 138 U. S. 464, 11 Sup. Ct. 419, 34 L. ed. 1044); Holton v. Guinn, 65 Fed. 450; Holladay v. Land &c. Imp. Co., 57 Fed. 774, 6 C. C. A. 560; Megibben v. Perin, 49 Fed. 183; Loubat v. Nourse, 5 Fla. 350; First Nat. Bank v. Cody, 93 Ga. 127, 19 S. E. 831; Kimball v. Lincoln, 99 Ill. 578 (1881); Walling v. Burgess, 122 Ind. 299, 22 N. E. 419, 23 N. E. 1076, 7 L. R. A. 481 (1889); Western Securities Co. v. Atlee (Iowa), 151 N. W. 56; Van Staden v. Kline, 64 Iowa 180, 20 N. W. 3 (1884); Sternberg v. Larkin, 58 Kans. 201, 48 Pac. 861, 37 L. R. A. 195; Divine v. Mitchum, 4 B. Mon. (Ky.) 488, 41 Am. Dec. 241; Buffum v. Buffum, 49 Maine 108, 77 Am. Dec. 249; Riley v. Carter, 76 Md. 581, 25 Atl. 667, 19 L. R. A. 489, 35 Am. St. 443; Hanson v. Metcalf, 46 Minn. 25, 48 N. W. 441; Armor v. Frey, 253 Mo. 447, 161 S. W. 829; Matthews v. Hunter, 67 Mo. 293; Sullivan v. Smith, 15 Nebr. 476, 19 N. W. 620, 48 Am. Rep. 354; Deveney v. Mahoney, 23 N. J. Eq. 247; Collumb v. Read, 24 N. Y. 505; Buchan v. Sumner, 2 Barb. Ch. (N. Y.) 165, 47 Am. Dec. 305; Sherrod v. Mayo, 156 N. Car. 144, 72 S. E. 216, Ann. Cas. 1912 D. 1205; Rammelsberg v. Mitchell, 29 Ohio St. 22; Tillinghast v. Champlin, 4 R. I. 173, 67 Am. Dec. 510; Griffey v. Northcutt, 5 Heisk. (Tenn.) 746; Dyer v. Morse, 10 Wash. 492, 39 Pac. 138, 28 L. R. A. 89; Fereday v. Wightwick, 1 Russ. & M. 45, Taml. 250; Phillips v. Phillips, 1 Myl. & K. 649, 663, 1 L. J. Ch. (N. S.) 214; Broom v. Broom, 3 Myl. & K. 443.

[98] French v. Vanatta, 83 Ark. 306, 104 S. W. 141; Holton v. Guinn, 65 Fed. 450; Clay v. Field, 34 Fed. 375 (mod. 138 U. S. 464, 11 Sup. Ct. 419, 34 L. ed. 1044); Southern Cotton Oil Co. v. Henshaw, 89 Ala. 448, 7 So. 760; Espy v. Comer, 76 Ala. 501; Caldwell v. Parmer, 56 Ala. 405; Lang v. Waring, 25 Ala. 625, 60 Am. Dec. 533; Robinson v. Roberts, 31 Conn. 145; Price v. Hicks, 14 Fla. 565; Sternberg v. Larkin, 58 Kans. 201, 48 Pac. 861, 37 L. R. A. 195; Wilson v. Soper, 13 B. Mon. (Ky.) 411, 56 Am. Dec. 573; Wyer v. Winchester, 2 Mart. (N. S.) (La.) 69; Priest v. Chouteau, 85 Mo. 398, 55 Am. Rep. 373; Holmes v. McGee, 27 Mo. 597; McCormick's Appeal, 57 Pa. St. 54, 98 Am. Dec. 191; Jones v. Sharp, 9 Heisk. (Tenn.) 660; Yeatman v. Woods, 6 Yerg. (Tenn.) 20, 27 Am. Dec. 452.

[99] Armor v. Frey, 253 Mo. 447, 161 S. W. 829.

[1] Western Securities Co. v. Atlee (Iowa), 151 N. W. 56.

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on the death of one the legal title in his interest passes to his legal heirs,[2] who hold in common with the surviving partner.[3] But this legal title in the heir is held subject to a trust in favor of the partnership and the surviving partner who is charged with the payment of firm debts and the settlement of firm accounts.[4] Even if the record title to real estate which is in fact partnership real estate is in the deceased partner, his heirs take the legal title subject to the same trust for the surviving partner and the equitable purposes of the partnership.[5] In such case, however,

[2] Sherrod v. Mayo, 156 N. Car. 144, 72 S. E. 216; Clay v. Field, 34 Fed. 375 (mod. 138 U. S. 464, 11 Sup. Ct. 419, 34 L. ed. 1044); Logan v. Greenlaw, 25 Fed. 299; Andrews v. Brown, 21 Ala. 437, 56 Am. Dec. 252; Percifull v. Platt, 36 Ark. 456; Dupuy v. Leavenworth, 17 Cal. 262; Loubat v. Nourse, 5 Fla. 350; Baker v. Middlebrooks, 81 Ga. 491, 8 S. E. 320; Galbraith v. Gedge, 16 B. Mon. (Ky.) 631; Goodburn v. Stevens, 5 Gill (Md.) 1; Hanway v. Robertshaw, 49 Miss. 758; Smith v. Jackson, 2 Edw. Ch. (N. Y.) 28; Buckley v. Buckley, 11 Barb. (N. Y.) 43; Buchan v. Sumner, 2 Barb. Ch. (N. Y.) 165, 47 Am. Dec. 305; Greene v. Graham, 5 Ohio 264; Summey v. Patton, 60 N. Car. 601, Winst. Eq. 52, 86 Am. Dec. 451; Yeatman v. Woods, 6 Yerg. (Tenn.) 20, 27 Am. Dec. 452; Piper v. Smith, 1 Head (Tenn.) 93; Williamson v. Fontain, 7 Baxt. (Tenn.) 212; Griffey v. Northcutt, 5 Heisk. (Tenn.) 746; Murrell v. Mandelbaum, 85 Tex. 22, 19 S. W. 880, 34 Am. St. 777.

[3] Penn v. Megibben, 53 Fed. 86; Hanway v. Robertshaw, 49 Miss. 758; Scruggs v. Blair, 44 Miss. 406; Buckley v. Buckley, 11 Barb. (N. Y.) 43; Buchan v. Sumner, 2 Barb. Ch. (N. Y.) 165, 47 Am. Dec. 305; Greene v. Graham, 5 Ohio 264; Broom v. Broom, 3 Myl. & K. 443.

[4] Woodward-Holmes Co. v. Nudd, 58 Minn. 236, 59 N. W. 1010, 27 L. R. A. 340, 49 Am. St. 503; Megibben v. Perin, 49 Fed. 183; Logan v. Greenlaw, 25 Fed. 299; Blanchard v. Floyd, 93 Ala. 53, 9 So. 418; Abernathy v. Moses, 73 Ala. 381; Caldwell v. Parmer, 56 Ala. 405; Andrews v. Brown, 21 Ala. 437, 56 Am. Dec. 252; Pugh v. Currie, 5 Ala. 446; Dupuy v. Leavenworth, 17 Cal. 262; Loubat v. Nourse, 5 Fla. 350; Rossum v. Sinker (Ind.), 12 Cent. L. J. 202; Goodburn v. Stevens, 5 Gill (Md.) 1; Dyer v. Clark, 5 Met. (Mass.) 562, 39 Am. Dec. 697; Burnside v. Merrick, 4 Met. (Mass.) 537; Merritt v. Dickey, 38 Mich. 41; Hanway v. Robertshaw, 49 Miss. 758; Scruggs v. Blair, 44 Miss. 406; Priest v. Chouteau, 85 Mo. 398, 55 Am. Rep. 373; Cilley v. Huse, 40 N. H. 358; Delmonico v. Guillaume, 2 Sandf. Ch. (N. Y.) 366; Rammelsberg v. Mitchell, 29 Ohio St. 22; Murrell v. Mandelbaum, 85 Tex. 22, 19 S. W. 880, 34 Am. St. 777; Pierce v. Trigg, 10 Leigh (Va.) 406; Ripley v. Waterworth, 7 Ves. Jr. 425; Dale v. Hamilton, 5 Hare 369, 16 L. J. Ch. (N. S.) 126, 11 Jur. 163.

[5] Little v. Snedecor, 52 Ala. 167;

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the purchaser without notice from the holder of the legal title is protected from the secret equity in favor of the partnership.[6] If the real estate has by agreement of the partners or by will of the deceased partner been converted into personalty for all purposes, the surviving partner may transfer the valid legal title,[7] or if under the laws of the particular jurisdiction he has the power to convey such real estate,[8] or of course, if the title is in his name and he happens to be the only survivor. A sale by a surviving partner of partnership real estate to pay his individual debts passes only his individual interest,[9] and a quitclaim deed to partnership lands by a surviving partner passes only his interest,[10] although it is sometimes held that if conversion out and out into personalty has not been made by record agreement, the representatives of a deceased partner must join in a conveyance in order to give complete legal title. Where the personal property of a firm is insufficient to pay its debts, its realty may be subjected

Houston v. Stanton, 11 Ala. 412; Pugh v. Currie, 5 Ala. 446; Dupuy v. Leavenworth, 17 Cal. 262; Johnson v. Clark, 18 Kans. 157; Way v. Stebbins, 47 Mich. 296, 11 N. W. 166; Burnand v. Nerot, 2 Bligh. (N. S.) 215, 4 Eng. Reprint 1112, 6 L. J. Ch. (O. S.) 81, 4 Russ. 247, 38 Eng. Reprint 798; Eng. Partnership Act (1890), § 20.

[6] Hartnett v. Stillwell, 121 Ga. 386, 49 S. E. 276, 104 Am. St. 151.

[7] Sherrod v. Mayo, 156 N. Car. 144, 72 S. E. 216, Ann. Cas. 1912 D, 1205; Davis v. Smith, 82 Ala. 198, 2 So. 897; Darrow v. Calkins, 154 N. Y. 503, 49 N. E. 61, 48 L. R. A. 299, 61 Am. St. 637 (affg. 6 App. Div. 28, 39 N. Y. S. 527); Moore v. Wood, 171 Pa. St. 365, 33 Atl. 63; Du Bree v. Albert, 100 Pa. St. 483; Meily v. Wood, 71 Pa. St. 488, 10 Am. Rep. 719.

[8] Jones v. Sharp, 9 Heisk. (Tenn.) 660; Solomon v. Fitzgerald, 7 Heisk. (Tenn.) 552; McAlister v. Montgomery, 3 Hayw. (Tenn.) 94; Sanborn v. Sanborn, 11 Grant Ch. (U. C.) 359.

[9] Caldwell v. Parmer, 56 Ala. 405; Lang v. Waring, 17 Ala. 145; First Nat. Bank v. Cody, 93 Ga. 127, 19 S. E. 831.

[10] Jackson v. Gunton, 218 Pa. 275, 67 Atl. 467; Sprague Mfg. Co. v. Hoyt, 29 Fed. 421; French v. Vanatta, 83 Ark. 306, 104 S. W. 141; Sternberg v. Larkin, 58 Kans. 201, 48 Pac. 861, 37 L. R. A. 195; Cornwall v. Cornwall, 6 Bush (Ky.) 369; Whitney v. Cotten, 53 Miss. 689; Clark v. Fleischmann, 81 Nebr. 445, 116 N. W. 290; Hill v. Beach, 1 Beas. (12 N. J. Eq.) 31; Rammelsberg v. Mitchell, 29 Ohio St. 22; Title & Trust Co. v. Bell, 188 Pa. St. 637, 41 Atl. 637; McPherson v. Swift, 22 S. Dak. 165, 116 N. W. 76, 133 Am. St. 907; State v. Neal, 29 Wash. 391, 69 Pac. 1103.

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for that purpose, by either the surviving partner,[11] or by firm creditors, if the firm is insolvent.[12] A deed executed by a joinder of a surviving partner with executors of the deceased with the fraudulent purpose of themselves acquiring the lands does not pass title.[13] It is not necessary for a purchaser of partnership real estate from a surviving partner who has authority to sell, to look to the application of the proceeds, but he acquires good title.[14]

§ 627. Rights of heirs, devisees, widow and personal representatives of deceased partner in partnership real estate.— As stated in the preceding section, the heirs of the deceased partner take the legal title to the deceased partner's interest in partnership real estate, subject to a trust in favor of the equitable winding up of all firm affairs, and can be compelled to execute a conveyance to a purchaser for full value, in order to pay firm debts.[15] By the great weight of authority, the remainder of the firm real estate after debts are paid and the equities adjusted between the partners descends, according to the laws of descent of real estate, to the deceased partner's heirs or devisees,[16] except where such real estate has been converted into personalty for

[11] Clay v. Freeman, 118 U. S. 97, 6 Sup. Ct. 964, 30 L. ed. 104; Shanks v. Klein, 104 U. S. 18, 26 L. ed. 635 (affg. Fed. Cas. No. 7870); Perin v. Megibben, 53 Fed. 86, 3 C. C. A. 443; Dyer v. Clark, 5 Metc. (Mass.) 562, 39 Am. Dec. 697; Leary v. Boggs, 41 Hun 643, 1 N. Y. St. 571; McCaskill v. Lancashire, 83 N. Car. 393. See also French v. Vanatta, 83 Ark. 306, 104 S. W. 141.

[12] Murphy v. Abrams, 50 Ala. 293; Holland v. Fuller, 13 Ind. 195; Graves v. Hardin, 55 S. W. 679, 21 Ky. L. 1499; Goodburn v. Stevens, 5 Gill (Md.) 1.

[13] Meyer v. Meyer (Miss.) 64 So. 420.

[14] Lovewell v. Schoolfield, 217 Fed. 689.

[15] See cases cited in notes 4, 5, 6, preceding section.

[16] See ante § 624; Oliver v. Piatt, 3 How. (U. S.) 333, 11 L. ed. 622 (affg. 3 McLean (U. S.) 27, Fed. Cas. No. 11116); Perin v. Megibben, 53 Fed. 86, 3 C. C. A. 443; Abernathy v. Moses, 73 Ala. 381; Lang v. Waring, 25 Ala. 625, 60 Am. Dec. 533; Houston v. Stanton, 11 Ala. 412; Lenow v. Fones, 48 Ark. 557, 4 S. W. 56; Gray v. Palmer, 9 Cal. 616; Galbraith v. Tracy, 153 Ill. 54, 38 N. E. 937, 28 L. R. A. 129, 46 Am. St. 867; Strong v. Lord, 107 Ill. 25; Pepper v. Pepper, 24 Ill. App. 316; Walling v. Burgess, 122 Ind. 299, 22 N. E. 419, 23 N. E. 1076, 7 L. R. A. 481; Patterson v. Blake, 12 Ind. 436; Hart v. Hawkins, 3 Bibb. (Ky.) 502, 6 Am.

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all purposes.[17] The widow's right of dower extends to this remainder,[18] and only to this remainder since she has no right to

Dec. 666; Galbraith v. Gedge, 16 B. Mon. (Ky.) 631; Buffum v. Buffum, 49 Maine 108, 77 Am. Dec. 249; Goodburn v. Stevens, 5 Gill (Md.) 1; Whitman v. Boston & M. R., 3 Allen (Mass.) 133; Shearer v. Shearer, 98 Mass. 107; Oliver v. Olmstead, 112 Mich. 483, 70 N. W. 1036; Woodward-Holmes Co. v. Nudd, 58 Minn. 236, 59 N. W. 1010, 27 L. R. A. 240, 49 Am. St. 503; Hanway v. Robertshaw, 49 Miss. 758; Scruggs v. Blair, 44 Miss. 406; In re Wallace, 28 Misc. 603, 59 N. Y. S. 1084; Priest v. Chouteau, 85 Mo. 398, 55 Am. Rep. 373; Collins v. Warren, 29 Mo. 236; Smith v. Wood, 1 N. J. Eq. 74; Buckley v. Buckley, 11 Barb. (N. Y.) 43; Buchan v. Sumner, 2 Barb. Ch. (N. Y.) 165, 47 Am. Dec. 305; Sears v. Mack, 2 Bradf. Sur. (N. Y.) 394; Fairchild v. Fairchild, 64 N. Y. 471 (affg. 5 Hun 407); Collumb v. Read, 24 N. Y. 505; Sherrod v. Mayo, 156 N. Car. 144, 72 S. E. 216; Summey v. Patton, 60 N. Car. 601, 86 Am. Dec. 451; Hanff v. Howard, 56 N. Car. 440; Sumner v. Hampson, 8 Ohio 328, 32 Am. Dec. 722; Foster's Appeal, 74 Pa. St. 391, 15 Am. Rep. 553; Tillinghast v. Champlin, 4 R. I. 173, 67 Am. Dec. 510; Rice v. Barnard, 20 Vt. 479, 50 Am. Dec. 54; Yeatman v. Woods, 6 Yerg. (Tenn.) 20, 27 Am. Dec. 452; Griffey v. Northcutt, 5 Heisk. (Tenn.) 746; McAlister v. Montgomery, 3 Hayw. (Tenn.) 94; Piper v. Smith, 1 Head (Tenn.) 93; Barcroft v. Snodgrass, 1 Coldw. (Tenn.) 430; Hannegan v. Roth, 12 Wash. 65, 40 Pac. 636; Weld v. Johnson Mfg. Co., 86 Wis. 552, 57 N. W. 374; Martin v. Morris, 62 Wis. 418, 22 N. W. 525; Marrett v. Murphy, 11 Nat. Bankr. Reg. 132; Doe v. McLeod, 8 U. C. Q. B. 344.

[17] Patrick v. Patrick, 71 N. J. Eq. 347, 63 Atl. 848; Ihmsen v. Huston (Pa.), 93 Atl. 601; Uniform Partnership Act, §§ 26, 25(d).

[18] Bennett v. Bennett, 137 Ky. 17, 121 S. W. 495, Ann. Cas. 1912 A, 407; Strong v. Lord, 107 Ill. 25; Bopp v. Fox, 63 Ill. 540; Hiscock v. Jaycox, 12 Nat. Bankr. Reg. 507, Fed. Cas. No. 6531; Holton v. Guinn, 65 Fed. 450; Perin v. Megibben, 53 Fed. 86, 3 C. C. A. 443; Brewer v. Browne, 68 Ala. 210; Lenow v. Fones, 48 Ark. 557, 4 S. W. 56; Ferris v. Van Ingen, 110 Ga. 102, 35 S. E. 347; Walling v. Burgess, 122 Ind. 299, 22 N. E. 419, 23 N. E. 1076, 7 L. R. A. 481; Hale v. Plummer, 6 Ind. 121; Matlock v. Matlock, 5 Ind. 403; Ratcliffe v. Mason, 92 Ky. 190, 17 S. W. 438, 13 Ky. L. 551; Goodburn v. Stevens, 1 Md. Ch. 420; Harris v. Harris, 153 Mass. 439, 26 N. E. 1117; Dyer v. Clark, 5 Met. (Mass.) 562, 39 Am. Dec. 697; Free v. Beatley, 95 Mich. 426, 54 N. W. 910; Woodward-Holmes Co. v. Nudd, 58 Minn. 236, 59 N. W. 1010, 27 L. R. A. 240, 49 Am. St. 503; Sykes v. Sykes, 49 Miss. 190; Young v. Thrasher, 115 Mo. 222, 21 S. W. 1104; Willet v. Brown, 65 Mo. 138, 27 Am. Rep. 265; Uhler v. Semple, 20 N. J. Eq. 288; Craighead v. Pike, 58 N. J. Eq. 15, 43 Atl. 424 (affd. 60 N. J. Eq. 443, 45 Atl. 1091); Sage v. Sherman, 2 N. Y. 417; Stroud v. Stroud, 61 N. Car. 525; Patton v. Patton, 60 N. Car. 572, 86 Am. Dec. 448; Foster's Appeal, 74 Pa. St. 391, 15 Am. Rep.

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dower until firm debts are paid and partnership equities settled.[19] The widow has no right to dower in partnership lands where it is held that they are converted into personalty for all purposes,[20] or where by agreement of the partners they have been so converted.[21] Under the rule in England and Canada, partnership real estate is treated as converted into personalty for all purposes, and the remainder goes to the deceased partner's personal representative.[22] Generally in this country, such remainder being considered realty, it does not go to the personal representative,[23]

553; Reed v. Kennedy, 2 Strobh. (S. Car.) 67; Martin v. Smith, 25 W. Va. 579.

[19] Walling v. Burgess, 122 Ind. 299, 22 N. E. 419, 23 N. E. 1076, 7 L. R. A. 481; Huston v. Neil, 41 Ind. 504; Dyer v. Clark, 5 Metc. (Mass.) 562, 39 Am. Dec. 697; Woodward-Holmes Co. v. Nudd, 58 Minn. 236, 59 N. W. 1010, 27 L. R. A. 340, 49 Am. St. 503; Hauptmann v. Hauptmann, 91 App. Div. 197, 86 N. Y. S. 427. See ante § 296, on right of dower in partnership real estate.

[20] Essex v. Essex, 20 Beav. 442; In re Music Hall Block, 8 Ont. 225; Deering v. Kerfoot, 89 Va. 491, 16 S. E. 671; Pierce v. Trigg, 10 Leigh (Va.) 406.

[21] Mallory v. Russell, 71 Iowa 63, 32 N. W. 102, 60 Am. Rep. 776; Greene v. Greene's Partners, 1 Ohio 535, 13 Am. Dec. 642; Lowe v. Lowe, 13 Bush (Ky.) 688. See also Coster v. Clarke, 3 Edw. Ch. (N. Y.) 428; Sumner v. Hampson, 8 Ohio 328, 32 Am. Dec. 722.

[22] Waterer v. Waterer, L. R. 15 Eq. 402, 21 Wkly. Rep. 508; Murtagh v. Costello, L. R. 7 Ir. 428; Darby v. Darby, 3 Drew. 495, 2 Jur. (N. S.) 271, 25 L. J. Ch. 371; Houghton v. Houghton, 5 Jur. 528, 10 L. J. Ch. 310, 11 Sim. 491, 34 Eng. Ch. 491, 59 Eng. Reprint 963; Wylie v. Wylie, 4 Grant Ch. (U. C.) 278; Eng. Partnership Act (1890), § 22.

[23] Clay v. Freeman, 118 U. S. 97, 30 L. ed. 104, 6 Sup. Ct. 964; Logan v. Greenlaw, 25 Fed. 299; In re Codding, 9 Fed. 849; Coolidge v. Burke, 69 Ark. 237, 62 S. W. 583; Lenow v. Fones, 48 Ark. 557, 4 S. W. 56; Loubat v. Nourse, 5 Fla. 350; Simpson v. Leech, 86 Ill. 286; Bopp v. Fox, 63 Ill. 540; Hewitt v. Rankin, 41 Iowa 35; Lowe v. Lowe, 13 Bush (Ky.) 688 (limiting Louisville Bank v. Hall, 8 Bush (Ky.) 672); Galbraith v. Gedge, 16 B. Mon. (Ky.) 631; Shearer v. Shearer, 98 Mass. 107; Wilcox v. Wilcox, 13 Allen (Mass.) 252; Dilworth v. Mayfield, 36 Miss. 40; Willet v. Brown, 65 Mo. 138, 27 Am. Rep. 265; Wooldridge v. Wilkins, 3 How. (Miss.) 360; Campbell v. Campbell, 30 N. J. Eq. 415; Uhler v. Semple, 20 N. J. Eq. 288; Buckley v. Buckley, 11 Barb. (N. Y.) 43; Buchan v. Sumner, 2 Barb. Ch. (N. Y.) 165, 47 Am. Dec. 305; Smith v. Jackson, 2 Edw. (N. Y.) 28; Coles v. Coles, 15 Johns. (N. Y.) 319, 1 Am. Lead Cas., Hare and Wallace notes, 494; Fairchild v. Fairchild, 64 N. Y. 478 (affg. 5 Hun 407); Fisher v. Lang, 10 Ohio Dec. (Reprint) 178, 19 Cinc. L. Bul. 139; In re Leaf's Appeal, 105 Pa. St. 505; Foster's Appeal, 74 Pa. St. 391, 15 Am. Rep. 553; Tillinghast v. Cham-

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but to the heirs of the deceased partner.[24] The personal representative of the deceased partner has no right to sell the partner's interest in firm realty, until after firm debts have been paid.[25] If the interest of the deceased partner in firm real estate is sold by his personal representative, the proceeds go to his estate.[26] A conveyance by personal representatives of a deceased partner of his interest in a partnership has been held to convey his interest in firm real estate.[27]

§ 628. **Rights of heirs and surviving partner in surplus real estate.**—If partnership realty has been converted into personalty out and out as by the English Partnership Act or Uniform Partnership Act, the surviving partner has the same power to sell any surplus not needed for the payment of debts, which he has over firm personal assets. And under the American decisions he has this power where by agreement partnership real estate has been changed into personalty for all purposes.[28] But under the general holdings in this country, where such conversion has not taken place, it is said that the surviving partner and the heirs of the deceased partner take such surplus in the character of realty as tenants in common,[29] and they may have a partition

plin, 4 R. I. 173, 67 Am. Dec. 510; Williamson v. Fontain, 7 Baxt. (Tenn.) 212; Jones v. Sharp, 9 Heisk. (Tenn.) 660; Griffey v. Northcutt, 5 Heisk. (Tenn.) 746.

[24] Lang v. Waring, 25 Ala. 625, 60 Am. Dec. 533; Branner v. Nichols, 61 Kans. 356, 59 Pac. 633; Shearer v. Shearer, 98 Mass. 107; Way v. Stebbins, 47 Mich. 296, 11 N. W. 166; Yeatman v. Woods, 6 Yerg. (Tenn.) 20; Griffey v. Northcutt, 5 Heisk. (Tenn.) 746; Solomon v. Fitzgerald, 7 Heisk. (Tenn.) 552; Williamson v. Fontain, 7 Baxt. (Tenn.) 212; Martin v. Morris, 62 Wis. 418, 22 N. W. 525; Weld v. Johnson Mfg. Co., 86 Wis. 552, 57 N. W. 374; Un Wong v. Kan Chu, 5 Haw. 225; Aldrich v. Robinson, 2 Haw. 606.

[25] McKean v. Vick, 108 Ill. 373; Cilley v. Huse, 40 N. H. 358; Williams v. Moore, 62 N. Car. 211.

[26] Hartnett v. Stillwell, 121 Ga. 386, 49 S. E. 276, 104 Am. St. 151.

[27] Ihmsen v. Huston (Pa.), 93 Atl. 601.

[28] Breen v. Richardson, 6 Colo. 605; Hyman v. Peters, 30 Ill. App. 134; Clark v. Fleischmann, 81 Nebr. 445, 116 N. W. 290; Patrick v. Patrick, 71 N. J. Eq. 347, 63 Atl. 848; Buckley v. Doig, 188 N. Y. 238, 80 N. E. 913; Du Bree v. Albert, 100 Pa. St. 483; Miller v. Ferguson, 107 Va. 249, 57 S. E. 649, 122 Am. St. 840.

[29] Espy v. Comer, 76 Ala. 501; Powers v. Robinson, 90 Ala. 225, 8 So. 10; Blanchard v. Floyd, 93 Ala. 53, 9 So. 418; McCauley v. Fulton,

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of it.[30] Other courts say that the surviving partner and the deceased partner's heirs do not take the surplus real estate as tenants in common,[31] while other decisions, some of them based on statute, declare for the same rule followed in England and seemingly provided for by the Uniform Partnership Act, that the surviving partner should convert into money all the partnership property.[32]

§ 629. Rights in firm real estate under Uniform Partnership Act.—The Uniform Partnership Act makes a very marked change in almost all the doctrines announced in the last preceding sections. It provides that a partner's interest in firm property is personalty, thus following the English rule of equitable conversion of partnership realty into personalty, for all pur-

44 Cal. 355; Loubat v. Nourse, 5 Fla. 350; Hartnett v. Stillwell, 121 Ga. 386, 49 S. E. 276, 104 Am. St. 151; Blake v. Nutter, 19 Maine 16; Dyer v. Clark, 5 Met. (Mass.) 562, 39 Am. Dec. 697; Scruggs v. Blair, 44 Miss. 406; Alexander v. Kimbro, 49 Miss. 529; Smith v. Jackson, 2 Edw. Ch. (N. Y.) 28; Treadwell v. Williams, 9 Bosw. (N. Y.) 649; Cundey v. Hall, 208 Pa. 335, 57 Atl. 761, 101 Am. St. 938; Hale v. Henrie, 2 Watts (Pa.) 143, 27 Am. Dec. 289.

[30] Brewer v. Browne, 68 Ala. 210; Thayer v. Lane, Walk. Ch. (Mich.) 200; Comstock v. McDonald, 126 Mich. 142, 85 N. W. 579; Way v. Stebbins, 47 Mich. 296, 11 N. W. 166; Craighead v. Pike, 58 N. J. Eq. 15, 43 Atl. 424 (affd. 60 N. J. Eq. 443, 45 Atl. 1091); Molineaux v. Raynolds, 54 N. J. Eq. 559, 35 Atl. 536; Smith v. Cowles, 81 App. Div. 328, 81 N. Y. S. 524; Greene v. Graham, 5 Ohio 264.

[31] Hoxie v. Carr, 1 Sumn. (U. S.) 173, Fed. Cas. No. 6802; Ingraham v. Mariner, 194 Ill. 269, 62 N. E. 609; Galbraith v. Tracy, 153 Ill. 54, 38 N. E. 937, 28 L. R. A. 129, 46 Am. St. 867; Needham v. Wright, 140 Ind. 190, 39 N. E. 510; McKee v. Covalt, 71 Kans. 772, 81 Pac. 475; Galbraith v. Gedge, 16 B. Mon. (Ky.) 631; Hanson v. Hanson, 4 Nebr. (Unof.) 880, 97 N. W. 23; Cilley v. Huse, 40 N. H. 358; Leary v. Boggs, 41 Hun 643, 1 N. Y. St. 571; Preston v. Fitch, 137 N. Y. 41, 33 N. E. 77 (revg. 19 N. Y. S. 849, 64 Hun 636, 46 N. Y. St. 588); Baird v. Baird's Heirs, 21 N. Car. 524, 31 Am. Dec. 399.

[32] Moran v. McInerney, 129 Cal. 29, 61 Pac. 575, 948; Ingraham v. Mariner, 194 Ill. 269, 62 N. E. 609; MacFarlane v. MacFarlane, 82 Hun 238, 63 N. Y. St. 589; Baird v. Baird's Heirs, 21 N. Car. 524, 31 Am. Dec. 399; McPherson v. Swift, 22 S. Dak. 165, 116 N. W. 76; McAllister v. Montgomery, 3 Hay (Tenn.) 94, Code of Tennessee (1896), § 3678; Pierce v. Trigg, 10 Leigh (Va.) 406; Comp. Laws Utah 1907, § 3918.

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poses,[33] and that on the death of a partner his right in specific partnership property vests in the surviving partner or partners, who have no right to possess such property except for partnership purposes.[34] It would seem that the intention and effect of these provisions is to permit the surviving partner to sell firm real property in the same manner as firm chattels. These provisions also change the general rules that firm real estate descends to a partner's heirs, subject only to a trust in favor of the partnership, and simplify the question as to the rights of heirs and personal representatives discussed in the last section. It is also provided that a partner's interest in specific firm property is not subject to dower, curtesy, or allowances to widows, heirs, or next of kin.[35] In this respect the act does not state a different rule from that laid down in most decisions.

§ 630. Liability of surviving partner and deceased partner's estate on firm obligations.—As a general rule, a firm creditor has no right to join the representatives of a deceased partner and a surviving partner in an action on an obligation of the firm, therefore, the surviving partner is liable to a several action, upon such obligation, just as on his individual obligation.[36] A firm creditor may also proceed against the deceased partner's estate on a firm obligation.[37] It was the early rule that the part-

[33] Uniform Partnership Act, § 26.

[34] Uniform Partnership Act, § 25 (d).

[35] Uniform Partnership Act, § 25 (e).

[36] Ross v. Everett, 12 Ga. 30; McLean v. McAllister, 30 Mo. App. 107; Wright v. Barton, 34 Nebr. 776, 52 N. W. 809; Carrere v. Spofford, 46 How. Pr. 294, 15 Abb. Pr. (N. S.) (N. Y.) 47; Bridge v. Swain, 3 Redf. Sur. (N. Y.) 487; Livingston v. Cox, 6 Pa. St. 360; Marvin v. McRae, Rice (S. Car.) 171; Calder v. Rutherford, 3 B. & B. 302, 7 Moore C. P. 158, 7 E. C. L. 743; Martin v. Crompe, 1 Ld. Raym. 340, 2 Salk. 444; Phillips v. Alhambra Palace Co. [1901], 1 K. B. 59, 70 L. J. K. B. 26, 83 L. T. Rep. (N. S.) 431; Campbell v. Farley, 18 Ont. Pr. 97; Connell v. Owen, 4 U. C. C. P. 113; Lindley Partnership (7th ed.) 326.

[37] Claflin v. Behr, 89 Ala. 503, 8 So. 45; McLain v. Carson, 4 Ark. 164, 37 Am. Dec. 777; Camp v. Grant, 21 Conn. 41, 54 Am. Dec. 321; Henry v. Caruthers, 196 Ill. 136, 63 N. E. 629 (affg. 95 Ill. App. 582); Doggett v. Dill, 108 Ill. 560, 48 Am. Rep. 565; Evans v. Superior Steel Co., 114 Ill. App. 505; Newman v. Gates, 165 Ind. 171, 72 N. E. 638; Maxey v. Averill, 2 B. Mon. (Ky.) 107; Boat-

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nership creditor could not proceed against a deceased partner's estate until he had first exhausted his remedy against the surviving partners, or had shown to the court that the survivors were insolvent, but such rule was changed in Great Britain by a leading case,[38] which held that a partnership creditor may in any case proceed against a deceased partner's estate, without regard to the survivor's insolvency, it being said that in equity partnership liability for debts is several as well as joint, and the estate of a member of a firm is liable as for an individual debt. This case has been followed by most English and American decisions since that time.[39] Judge Story thus stated the doctrine:[40] "The doctrine formerly held upon this subject seems to have been that the joint creditors had no claim whatsoever in equity against the estate of the deceased partner, except when the surviving partners were at the time of his death or subsequently became, insolvent or bankrupt. But that doctrine has since been overturned, and it is now held that in equity

men's Sav. Inst. v. Mead, 52 Mo. 543; Hamersley v. Lambert, 2 Johns. Ch. (N. Y.) 508; Moore's Appeal, 34 Pa. St. 411; Wilson v. McConnell, 9 Rich. Eq. (S. Car.) 500; Martin v. Morris, 62 Wis. 418, 22 N. W. 525; Brown v. Gordon, 16 Beav. 302, 22 L. J. Ch. 65; Winter v. Innes, 2 Jur. 981, 4 Myl. & C. 101, 18 Eng. Ch. 101, 41 Eng. Reprint 40; Wilkinson v. Henderson, 2 L. J. Ch. 190, 1 Myl. & K. 582, 7 Eng. Ch. 582, 39 Eng. Reprint 801; Bagel v. Miller [1903], 2 K. B. 212, 72 L. J. K. B. 495; Stocken v. Dawson, 9 Beav. 239, 50 Eng. Reprint 335 (affd. 17 L. J. Ch. 282).

[38] Devaynes v. Noble, 1 Mer. 529.

[39] Lewis v. United States, 82 U. S. 622, 21 L. ed. 215; Nelson v. Hill, 5 How. (U. S.) 127, 12 L. ed. 81; Travis v. Tartt, 8 Ala. 574; McLain v. Carson, 4 Ark. 164, 37 Am. Dec. 777; Camp v. Grant, 21 Conn. 41, 54 Am. Dec. 321; Fillyan v. Laverty, 3 Fla. 72; Union Trust Co. v. Shoemaker, 258 Ill. 564, 101 N. E. 1050 (affg. decree 172 Ill. App. 365); Doggett v. Dill, 108 Ill. 560, 48 Am. Rep. 565; Silverman v. Chase, 90 Ill. 37; Mason v. Tiffany, 45 Ill. 392; Hardy v. Overman, 36 Ind. 549; Dean v. Phillips, 17 Ind. 406; Weyer v. Thornburgh, 15 Ind. 124; Irby v. Graham, 46 Miss. 425; Freeman v. Stewart, 41 Miss. 138; Bowker v. Smith, 48 N. H. 111, 2 Am. Rep. 189; Wisham v. Lippincott, 1 Stockt. Eq. (N. J.) 353; Saunders v. Wilder, 2 Head (Tenn.) 577; Gaut v. Reed, 24 Tex. 46, 76 Am. Dec. 94; Washburn v. Bank of Bellows Falls, 19 Vt. 278; Wilkinson v. Henderson, 1 Myl. & K. 582; Braithwaite v. Britain, 1 Keen 206; Brown v. Douglas, 10 Law Journal 14.

[40] Story Partnership, § 362.

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all partnership debts are to be deemed joint and several, and consequently the joint creditors have in all cases the right to proceed at law against the survivors, and an election also to proceed in equity against the estate of a deceased partner whether the survivor be insolvent or bankrupt or not." So it is held that where a partnership creditor failed to proceed against a deceased partner's estate until after the insolvency of the survivors this does not affect the liability of the deceased partner's estate, although the claim could have been collected from the survivors before their insolvency.[41] But there have been many American decisions which followed the earlier rule, holding either the legal remedy against survivors must have been exhausted or their insolvency shown, before a firm creditor is entitled to proceed against the estate of a deceased partner.[42] A proceeding against the deceased partner's estate does not affect the liability of the surviving partner for the same claim.[43] Firm creditors are entitled to priority in firm assets over the individual creditors of a deceased partner,[44] but as a rule in most jurisdictions have not the right to share equally with individual creditors in his separate estate.[45] Although in some cases such right is allowed

[41] Doggett v. Dill, 108 Ill. 560, 48 Am. Rep. 565.

[42] Caldwell v. Stileman, 1 Rawle (Pa.) 212; Pendleton v. Phelps, 4 Day 476, Fed. Cas. No. 19923; Reimsdyke v. Kane, 1 Gall. (U. S.) 371; Daniel v. Townsend, 21 Ga. 155; Bennett v. Woolfolk, 15 Ga. 213; Lewis v. Conrad, 11 Iowa 153; Pearson v. Keedy, 6 B. Mon. (Ky.) 128, 43 Am. Dec. 160; In re Roberts, 214 N. Y. 369, 108 N. E. 562; Pope v. Cole, 55 N. Y. 124, 14 Am. Rep. 198; Hoyt v. Bonnett, 50 N. Y. 538; Richter v. Poppenhausen, 42 N. Y. 373; Voorhis v. Childs, 17 N. Y. 354; Trustees of Leake & Watts Orphan House v. Lawrence, 11 Paige (N. Y.) 80; Hamersley v. Lambert, 2 Johns. Ch. (N. Y.) 508; Jenkins v. De Groot, 1 Caines Case, in error (N. Y.) 122; Hubble v. Perrin, 3 Ohio 287; Sherman v. Kreul, 42 Wis. 33; Gray v. Chiswell, 9 Ves. 124.

[43] Finnegan v. Allen, 60 Ill. App. 354; In re Hodgson, 31 Ch. D. 177, 55 L. J. Ch. 241, 54 L. T. Rep. (N. S.) 222.

[44] Pilcher's Succession, 39 La. Ann. 362, 1 So. 929; Banks v. Steele, 27 Nebr. 138, 42 N. W. 883.

[45] See generally ch. 17, on application of assets. See also Bridge v. McCullough, 27 Ala. 661; Camp v. Grant, 21 Conn. 41, 54 Am. Dec. 321; Spratt v. First Nat. Bank, 84 Ky. 85, 7 Ky. L. 791; Dahlgren v. Duncan, 7 Sm. & M. (Miss.) 280; Barton Nat. Bank v. Atkins, 72 Vt. 33, 47 Atl. 176; Ex parte Dear, L. R.

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where there is no firm estate, and no living solvent partner.[46] It is generally held that the time for presenting a claim by a firm creditor against a deceased partner's estate is not limited by the statutes as to the presentation of claims by individual creditors.[47]

§ 631. Surviving partner's rights and liabilities as to deceased partner's estate.—The surviving partner's rights in possession of firm assets are only to convert them into cash, pay debts and wind up firm affairs;[48] he has no right to pay individual debts with firm assets.[49] Some courts hold him to a certain extent a trustee for the deceased partner's estate,[50] others follow the English holding that he is not such a trustee.[51] The survivor may recover from the estate of the deceased partner firm money which was misappropriated by the deceased or his representatives,[52] and so far as the rights of innocent purchasers are not affected, may pursue the property into which such money was

1 Ch. Div. 514, 45 L. J. Bankr. 22, 34 L. T. Rep. (N. S.) 631; Ridgway v. Clare, 19 Beav. 111, 52 Eng. Reprint 291; Lodge v. Pritchard, 1 DeG., J. & S. 610, 32 L. J. Ch. 775; Whittingstall v. Grover, 55 L. T. Rep. (N. S.) 213; Lee v. Flood, 2 Wkly. Rep. 26; In re Daniel, 75 L. T. Rep. (N. S.) 143, 3 Manson 312.

[46] Sparhawk v. Russell, 10 Metc. (Mass.) 305. See ch. 17, on application of assets.

[47] Corson v. Berson, 86 Cal. 433, 25 Pac. 7; Pendleton v. Phelps, Fed. Cas. No. 10923, 4 Day 476; Fillyau v. Laverty, 3 Fla. 72; Nagle v. Ball, 71 Miss. 330, 13 So. 929; Denny v. Turner, 2 Mo. App. 52; Sale v. Dishman, 3 Leigh (Va.) 548.

[48] Huggins v. Huggins, 117 Ga. 151, 43 S. E. 759; Dyas v. O'Neil, 3 Ohio S. & C. Pl. Dec. 309, 2 Ohio N. P. 81; Levy v. Archenhold (Tex. Civ. App.), 44 S. W. 46 (1898); In re Clough, 31 Ch. D. 324, 55 L. J. Ch. 77, 53 L. T. Rep. (N. S.) 716; Kerrison v. Reddington, 11 Ir. Eq. 451.

[49] Jones v. Dulaney, 86 S. W. 547, 977, 27 Ky. L. 702.

[50] Andrews v. Stinson, 254 Ill. 111, 98 N. E. 222 (revg. judgment 164 Ill. App. 25); Galbraith v. Tracy, 153 Ill. 54, 38 N. E. 937, 28 L. R. A. 129, 46 Am. St. 867; Heffron v. Knickerbocker, 57 Ill. App. 336; Jones v. Dulaney, 86 S. W. 547, 977, 27 Ky. L. 702, 810; Fried v. Burk, 125 Md. 500, 94 Atl. 86; Milam v. Hill, 29 Tex. Civ. App. 573, 69 S. W. 447; Tennant v. Dunlop, 97 Va. 234, 33 S. E. 620.

[51] Mulherin v. Rice, 106 Ga. 810, 32 S. E. 865; Knox v. Gye, L. R. 5 H. L. 656, 42 L. J. Ch. 234; Chambers v. Howell, 11 Beav. 6, 12 Jur. 905, 50 Eng. Reprint 718; Eng. Partnership Act (1890), § 43.

[52] Price v. Hicks, 14 Fla. 565; Bradley v. Brigham, 144 Mass. 181, 10 N. E. 793; In re Miller, 157 Pa. St. 224,

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changed.[53] He has a right to collect from the estate of a deceased partner debts owing by such partner to the firm,[54] and may retain a sufficient portion of such partner's share in firm assets to satisfy his debt to the firm.[55] And if the surviving partner is compelled to pay firm debts the deceased partner's estate must reimburse him for that partner's share in the loss.[56] It has been held that where a partner pays firm debts or pays out money for the firm, his claim for contribution from the deceased partner's estate is contingent, and does not become absolute until settlement of partnership affairs.[57] By the Uniform Partnership Act a deceased partner's individual property is bound to contribute to the liabilities of the partnership if needed.[58] If the survivor makes improvements necessary in winding up the business, he is entitled to reimbursement from the firm assets, and to contribution from the deceased partner's estate if firm assets are insufficient.[59] The surviving partner must use reasonable diligence and skill in winding up the firm's affairs, and must respond for any depreciation or loss caused by a failure to do so.[60] Any use of firm

27 Atl. 698; Alexander v. Coulter, 2 Serg. & R. (Pa.) 494.

[53] Holmes v. Gilman, 138 N. Y. 369, 34 N. E. 205, 20 L. R. A. 566, 34 Am. St. 463 (revg. 64 Hun 227, 19 N. Y. S. 151 and affg. 18 N. Y. S. 56).

[54] Painter v. Painter, 68 Cal. 395, 9 Pac. 450; Bird v. Bird, 77 Maine 499, 1 Atl. 455; McCormick's Appeal, 55 Pa. St. 252.

[55] Painter v. Painter, 133 Cal. xix, 36 Pac. 865; In re Morris, L. R. 10 Ch. App. Cas. 68, 44 L. J. Ch. 178, 31 L. T. Rep. (N. S.) 491, 23 Wkly. Rep. 120.

[56] In re Burdick, 140 N. Y. S. 582, 79 Misc. 167, 4 N. Y. Civ. Proc. R. 21; Olleman v. Reagan, 28 Ind. 109; Goldthwait v. Day, 149 Mass. 185, 21 N. E. 359; Wheeler v. Arnold, 30 Mich. 304; Hanna v. Wray, 77 Pa. St. 27; Ridgway v. Clare, 19 Beav. 111, 52 Eng. Reprint 291; In re Daniel, 75 L. T. Rep. (N. S.) 143, 3 Manson 312; In re Ruby, 24 Ont. App. 509.

[57] Blakely v. Smock, 96 Wis. 611, 71 N. W. 1052; Logan v. Dixon, 73 Wis. 533, 41 N. W. 713; Gleason v. White, 34 Cal. 258.

[58] Uniform Partnership Act, § 40 (g).

[59] Tillotson v. Tillotson, 34 Conn. 335; Beck v. Thompson, 22 Nev. 109, 36 Pac. 562.

[60] Maynard v. Richards, 166 Ill. 466, 46 N. E. 1138, 57 Am. St. 145 (affg. 61 Ill. App. 336); Harrah v. Dyer (Ind.), 102 N. E. 14; Swafford v. White, 89 S. W. 129, 28 Ky. L. 119; Cockerham v. Bosley, 52 La. Ann. 65, 26 So. 814; Baker v. Baltimore Safe Deposit &c. Co., 90 Md. 744, 45 Atl. 1028, 78 Am. St. 463; Bundy v. Youmans, 44 Mich. 376, 6 N. W. 851; Stanhope v. Suplee, 2

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assets for personal benefit or in a manner not authorized by law is at his own risk of loss,[61] and for all profits made by an unauthorized use of firm assets, he must account to the deceased partner's estate for an interest therein proportional to the deceased's share in the business.[62] If the deceased partner's estate is compelled to pay firm debts, the deceased's representation is entitled to contribution from the survivor,[63] and may proceed to set aside a voluntary conveyance of the surviving partner's estate as fraudulent.[64]

§ 632. Surviving partner and good-will of business.—In case of dissolution by death of a partner, the same rules as to good-will apply as in other cases of dissolution, namely, that each partner or the deceased partner's estate, in the absence of agreement, is entitled to a sale of the good-will and a share in its proceeds.[65] It was formerly held that the right to use the firm name passed to the surviving partner.[66] But it is now held that

Brewst. (Pa.) 455; Condon v. Callahan, 115 Tenn. 285, 89 S. W. 400, 1 L. R. A. (N. S.) 643, 112 Am. St. 833; Gresham v. Harcourt, 93 Tex. 149, 53 S. W. 1019 (revg. Tex. Civ. App., 50 S. W. 1058); Hunter v. Dowling [1893], 3 Ch. 212, 62 L. J. Ch. 617, 68 L. T. (N. S.) 780; Marjoram v. Saundeford, Rom. Cas. 110; In re Wentworth &c. Surrogate Ct., 44 U. C. Q. B. 207.

[61] Morgan v. Morgan, 68 Ala. 80; Fitz v. Reichard, 20 La. Ann. 549; Bauchle v. Smylie, 104 App. Div. 513, 93 N. Y. S. 709; Hibberd v. Hubbard, 211 Pa. 331, 338, 60 Atl. 911, 913.

[62] Dovey v. Dovey, 95 Nebr. 624, 146 N. W. 923; Painter v. Painter (Cal.), 65 Pac. 135; Qliver v. Forrester, 96 Ill. 315 (revg. 1 Ill. App. 259); Young v. Scoville, 99 Iowa 177, 68 N. W. 670; Roberts v. Hendrickson, 75 Mo. App. 484; Booth v. Parkes, Beatty 444; Eng. Partnership Act (1890), § 29 (2).

[63] Hill v. Huston, 15 Grat. (Va.) 350.

[64] Alston v. Rowles, 13 Fla. 117.

[65] Matter of Silkman, 121 App. Div. 202, 105 N. Y. S. 872 (affd. 190 N. Y. 560, 83 N. E. 1131); Howe v. Searing, 6 Bosw. (N. Y.) 354; Williams v. Wilson, 4 Sandf. Ch. (N. Y.) 379; Dougherty v. Van Nostrand, 1 Hoffm. Ch. (N. Y.) 68; Holden v. McMakin, 1 Pars. Sel. Eq. Cas. (Pa.) 270; Wedderburn v. Wedderburn, 22 Beav. 84; Smith v. Everett, 27 Beav. 446.

[66] Lewis v. Langdon, 4 L. J. Ch. 258, 7 Sim. 421; Blake v. Barnes, 12 N. Y. S. 69, 26 Abb. N. Cas. 208 (affd. 58 Hun 525, 12 N. Y. S. 354, 34 N. Y. St. 919); Mason v. Dawson, 15 Misc. 595, 37 N. Y. S. 90, 72 N. Y. St. 123.

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the right to use the firm name is a part of the good-will, for which, if valuable, the surviving partner must account to the deceased partner's estate.[67] The survivor may purchase the right to use it from the deceased partner's estate.[68] Under the general rule the surviving partner may set up business for himself at the old stand, without liability for damage to the good-will as a part of firm assets.[69] Continuance of the business by the surviving partner in the old firm name, even if the name includes that of the deceased partner, does not, in itself, make the deceased partner's estate liable.[70] In some jurisdictions statutes allow the use of such name by the survivor upon compliance with their provisions,[71] while in others the personal representatives of the deceased have a statutory right to enjoin such use.[72]

[67] Slater v. Slater, 175 N. Y. 143, 67 N. E. 224, 61 L. R. A. 796, 96 Am. St. 605 (mod. 78 App. Div. 449, 80 N. Y. S. 363); Kirkman v. Kirkman, 20 Misc. 211, 45 N. Y. S. 373 (affd. 26 App. Div. 395, 49 N. Y. S. 683); Fenn v. Bolles, 7 Abb. Pr. (N. Y.) 202; Rammelsberg v. Mitchell, 29 Ohio St. 22; Holden v. McMakin, 1 Pars. Eq. Cas. (Pa.) 270; Tennant v. Dunlop, 97 Va. 234, 33 S. E. 620; Rowell v. Rowell, 122 Wis. 1, 99 N. W. 473; In re David [1899], 1 Ch. 378, 68 L. J. Ch. 185, 80 L. T. Rep. (N. S.) 75; Smith v. Hawthorne, 76 L. T. (N. S.) 716; Page v. Ratliffe, 76 L. T. (N. S.) 63; Wedderburn v. Wedderburn, 22 Beav. 84, 2 Jur. (N. S.) 674, 25 L. J. Ch. 710, 52 Eng. Reprint 1039.

[68] Rankin v. Newman, 114 Cal. 635, 46 Pac. 742, 34 L. R. A. 265.

[69] Hutchinson v. Nay, 187 Mass. 262, 72 N. E. 974, 68 L. R. A. 186, 105 Am. St. 390; Wilbeck v. Chittenden, 50 Mich. 426, 15 N. W. 537; Chittenden v. Witbeck, 50 Mich. 401, 15 N. W. 526; Scudder v. Ames, 142 Mo. 187, 43 S. W. 659; Lobeck v. Lee-Clark-Andreesen Hardware Co., 37 Nebr. 158, 55 N. W. 650, 23 L. R. A. 795; Fisk v. Fisk, 77 N. Y. App. Div. 83, 79 N. Y. S. 37, 12 N. Y. Ann. Cas. 228; DeGrauw v. Schmid, 38 App. Div. 189, 56 N. Y. S. 593, applying laws (1897), ch. 420; Davies v. Hodgson, 25 Beav. 177, 4 Jur. (N. S.) 252, 27 L. J. Ch. 449, 6 Wkly. Rep. 355, 53 Eng. Reprint 604.

[70] Price v. Mathews, 14 La. Ann. 11; National Bank of Maryland v. Hollingsworth, 135 N. Car. 556, 47 S. E. 618; Altgelt v. Sullivan (Tex. Civ. App.), 79 S. W. 333; Webster v. Webster, 3 Swanst. 490; English Partnership Act (1890), § 14 (2).

[71] Mass. Stat. 1887, ch. 248, applied in Groves v. Wilson, 168 Mass. 370, 47 N. E. 100; N. Y. Laws (1897), ch. 420, § 20, applied in Slater v. Slater, 175 N. Y. 143, 67 N. E. 224, 61 L. R. A. 796, 96 Am. St. 605 (mod. 78 App. Div. 449, 80 N. Y. S. 363).

[72] Lodge v. Weld, 139 Mass. 499, 2 N. E. 95; Morse v. Hall, 109 Mass. 409; Bowman v. Floyd, 3 Allen (Mass.) 76, 80 Am. Dec. 55. Compare Lane v. Arnold, 11 Daly 293,

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§ 633. Surviving partner as deceased partner's executor or administrator.—Where a surviving partner is also the executor or administrator of the deceased partner, he acts in a dual capacity, representing both the partnership and the deceased partner's estate. His duties as surviving partner are practically the same as in any other case, to convert the assets of the firm into money and receive, hold and distribute the proceeds.[73] And as such, it is his duty to ascertain and get together the deceased partner's share in the firm property and assets and turn this over to the deceased's separate estate.[74] But he has no right to possession of chattels not assets of the partnership.[75] And he may also call upon the estate to contribute for debts which he has paid, if the firm assets are insufficient,[76] although laches may bar his right to contribution.[77] But as surviving partner he can not apply the separate assets of the deceased partner to the payment of firm debts, nor sell his separate property for that purpose.[78] He can not in one capacity contract with himself in his other capacity,[79] and a sale by himself as surviving partner to himself as personal representative, or vice versa, is voidable,[80] although

revd. 99 N. Y. 648; Sparrow v. Kohn, 109 Pa. St. 359, 2 Atl. 498, 58 Am. Rep. 726.

[73] Gossios v. Wulff (Mo. App.), 165 S. W. 817; Pearson v. Keedy, 6 B. Mon. (Ky.) 128, 43 Am. Dec. 160; Matter of Thieriot, 117 App. Div. 686, 102 N. Y. S. 952; Beste v. Burger, 110 N. Y. 644, 17 N. E. 734, 2 Silvernail Ct. App. 91 (affg. 13 Daly 317, 17 Abb. N. Cas. 162); Clausen v. Puvogel, 114 App. Div. 455, 100 N. Y. S. 49; Kreis v. Gorton, 23 Ohio St. 468; Palicio v. Bigne, 15 Ore. 142, 13 Pac. 765; In re Morris, L. R. 10 Ch. App. Cas. 68, 44 L. J. Ch. 178, 31 L. T. Rep. (N. S.) 491; Way v. Bassett, 5 Hare 55, 10 Jur. 89, 15 L. J. Ch. 1, 26 Eng. Ch. 55.

[74] In re Woodruff's Estate, Tuck. (N. Y.) 1; In re Dair, Ohio Prob. R. 233; Grant v. McKinney, 36 Tex. 62; Rowell v. Rowell, 122 Wis. 1, 99 N. W. 473.

[75] In re Whitlow's Estate, 184 Mo. App. 229, 167 S. W. 463.

[76] Mead v. Byington, 10 Vt. 116; Boyle v. Boyle, 4 B. Mon. (Ky.) 570.

[77] Hardisty v. Hardisty, 77 Md. 179, 26 Atl. 322; In re De Coursey, 211 Pa. 92, 60 Atl. 490.

[78] Boyle v. Boyle, 4 B. Mon. (Ky.) 570; Shelly v. Hiatt, 52 N. Car. 509; Gee v. Humphries, 49 S. Car. 253, 27 S. E. 101.

[79] In re Leavitt's Estate, 20 N. Y. S. 58, 28 Abb. N. Cas. 457, 1 Powers 74; Egan v. Wirth, 26 R. I. 363, 58 Atl. 987.

[80] Nelson v. Hayner, 66 Ill. 487; Denholm v. McKay, 148 Mass. 434, 19 N. E. 551, 12 Am. St. 574; Bauchle v. Smylie, 104 App. Div. 513, 93 N.

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in Louisiana such sale and purchase is allowed by statute.[81] If he fails to account to the deceased partner's estate for his share, resort may be had to court to force an accounting,[82] for the fair valuation of such share at the time of the deceased partner's death.[83] He is under a duty as administrator of the deceased partner's estate to account in court, and may, it seems, account as surviving partner in connection therewith,[84] and the judgment of such court is conclusive if not appealed from.[85] Provision may be made in partnership articles for payment by a surviving partner to a deceased partner's widow before final settlement and distribution,[86] but if a surviving partner, who is also his deceased partner's administrator, makes such an allowance without authority in the partnership agreement, he has misappropriated the firm assets.[87]

§ 634. Partnership administrator under statute.—As was seen in a preceding section,[88] many states regulate by statute the administration of partnership affairs after the death of a partner, providing for the giving of a bond and other formalities, and usually forbidding the settlement of a partnership estate in any

Y. S. 709; Gee v. Humphries, 49 S. Car. 253, 27 S. E. 101; Hart v. Hart, 31 W. Va. 688, 8 S. E. 562.

[81] Savage v. Williams, 15 La. Ann. 250; Carter v. McManus, 15 La. Ann. 641.

[82] Vincent v. Martin, 79 Ala. 540; Raison v. Williams, 42 S. W. 1108, 19 Ky. L. 1142; Leland v. Newton, 102 Mass. 350; Stewart v. Burkhalter, 28 Miss. 396; Matter of Mertens, 39 Misc. 512, 80 N. Y. S. 376; Matter of Dummett, 38 Misc. 477, 77 N. Y. S. 1118. See also Clausen v. Puvogel, 114 App. Div. 455, 100 N. Y. S. 49; Egan v. Wirth, 26 R. I. 363, 58 Atl. 987; Mack v. Mack, 26 Nova Scotia 24 (affd. 23 Can. Sup. Ct. 146). Compare Hutton v. Laws, 55 Iowa 710, 8 N. W. 642.

[83] Broughton v. Broughton, 44 L. J. Ch. 526.

[84] In re Hearns, 214 N. Y. 426, 108 N. E. 816; State ex rel. Whitlow v. American Surety Co. of New York (Mo. App.), 177 S. W. 1074.

[85] State v. American Surety Co. of New York (Mo. App.), 177 S. W. 1074.

[86] McClean v. Kennard, L. R. 9 Ch. 336, 43 L. J. Ch. 323, 30 L. T. Rep. (N. S.) 186, 22 Wkly. Rep. 382; Johnston v. Moore, 4 Jur. (N. S.) 356, 27 L. J. Ch. 453, 6 Wkly. Rep. 490. See also Harrah v. Dyer (Ind. App.), 96 N. E. 41.

[87] Sellers v. Shore, 89 Ga. 416, 15 S. E. 494; Julian v. Wrightsman, 73 Mo. 569; Miller v. Berry, 19 S. Dak. 625, 104 N. W. 311.

[88] See ante § 615.

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other manner.[89] These statutes usually regulate powers of the administrator in managing firm affairs,[90] and in the settlement and payment of claims,[91] and provide for an accounting in a certain court.[92] Statutory provisions usually regulate the giving of a bond by such administrator,[93] and determine what is a breach of its conditions and the remedy for such breach.[94]

§ 635. Winding up the business.—It has been seen that a surviving partner may mortgage firm assets to secure firm debts,[95]

[89] Dow v. Simpson, 17 N. Mex. 357, 132 Pac. 568; Teney v. Laing, 47 Kans. 297, 27 Pac. 976; Towler v. Bull, 3 Kans. App. 626, 44 Pac. 30; In re Curlee, 118 La. 563, 43 So. 165; Notrebe v. McKinney, 6 Rob. (La.) 13; Bass v. Emery, 74 Maine 338; Barnes v. Stone, 198 Mo. 471, 95 S. W. 915; Headlee v. Cloud, 51 Mo. 301; Green v. Virden, 22 Mo. 506; State v. Neal, 29 Wash. 391, 69 Pac. 1103.

[90] Shattuck v. Chandler, 40 Kans. 516, 20 Pac. 225, 10 Am. St. 227; Bell v. McCoy, 136 Mo. 552, 38 S. W. 329; Easton v. Courtwright, 84 Mo. 27; Springfield Grocer Co. v. Shackelford, 56 Mo. App. 642.

[91] In re Curlee, 118 La. 563, 43 So. 165; Barnes v. Stone, 198 Mo. 471, 95 S. W. 915; Easton v. Courtwright, 84 Mo. 27; State v. Shacklett, 73 Mo. App. 265; In re Whitlow's Estate (Mo. App.), 167 S. W. 463; Collier v. Cairns, 6 Mo. App. 188.

[92] Wolfort v. Reilly, 133 Mo. 463, 34 S. W. 847; In re Glover, 127 Mo. 153, 29 S. W. 982; Christy v. Donegan, 83 Mo. 374; Crow v. Weidner, 36 Mo. 412; State v. Shacklett, 115 Mo. App. 715, 91 S. W. 956; Cogswell v. Frendenau, 93 Mo. App. 482, 67 S. W. 744; In re Curlee, 118 La. 563, 43 So. 165.

[93] State ex rel. Whitlow v. American Surety Co. of New York (Mo. App.), 177 S. W. 1074; Gurley v. Gurley, 77 Miss. 413, 26 So. 962; Goodson v. Goodson, 140 Mo. 206, 41 S. W. 737; Hays v. Odom, 79 Mo. App. 425; Hill v. Treat, 67 Maine 501; Cook v. Lewis, 36 Maine 340.

[94] Miller v. Kingsbury, 128 Ill. 45, 21 N. E. 209 (affg. 28 Ill. App. 532); State v. United States Fidelity &c. Co., 4 Pennew. (Del.) 428, 56 Atl. 607; Adams v. Marsteller, 70 Ind. 381; Harrah v. State, 38 Ind. App. 495, 76 N. E. 443, 77 N. E. 747; Carr v. Catlin, 13 Kans. 393; Macready v. Schenck, 41 La. Ann. 456, 6 So. 517; Walmsley v. Mendelsohn, 31 La. Ann. 152; Twibill's Succession, 14 La. Ann. 645; State v. Baldwin, 31 Mo. 561; State v. Shacklett, 115 Mo. App. 715, 91 S. W. 956; State v. Smith, 57 Mo. App. 120; State v. Myers, 9 Mo. App. 44.

[95] See ante § 620, on power of alienation; Central Trust &c. Co. v. Respass, 112 Ky. 606, 66 S. W. 421, 23 Ky. L. 1905, 56 L. R. A. 479, 99 Am. St. 317; Rosenthal v. Hasberg, 84 N. Y. S. 290; Calvert v. Miller, 94 N. Car. 600; Herron v. Wampler, 194 Pa. St. 277, 45 Atl. 81.

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and may incur debts incidental to the winding up of the business for which the firm assets are bound.[96] He may compel contribution from a deceased partner's estate if firm assets are insufficient to pay such debts.[97] But there is, in most jurisdictions, no right in the surviving partner to bind the estate of the deceased partner,[98] and it has been held that this right does not exist, unless by will or contract.[99] Under ordinary circumstances, one surviving partner can not bind his co-survivors by signing the firm name, unless there is express agreement or ratification thereto by those sought to be bound.[1] Ordinarily a surviving partner is liable individually for the breach of any contract which he enters into.[2] If he acts with a high degree of good faith, which is required both by the former partnership relationship and by the fiduciary relationship to the estate of the deceased partner, which he occupies, the surviving partner may purchase the interest of the deceased partner.[3] Such purchase may be

[96] See §§ 617, 618, on rights and powers of surviving partner.

[97] Hart v. Bowen, 86 Fed. 877, 31 C. C. A. 31; Dolan v. Lee, 40 N. J. Eq. 338 (affg. 39 N. J. Eq. 193); Preston v. Fitch, 137 N. Y. 41, 33 N. E. 77 (revg. 19 N. Y. S. 849, 64 Hun 636, 46 N. Y. St. 588); Allen v. Blanchard, 9 Cow. (N. Y.) 631; O'Neill v. Duff, 33 Leg. Int. 408, 11 Phila. (Pa.) 244.

[98] Bagel v. Miller [1903], 2 K. B. 212, 72 L. J. K. B. 495; Bauer Grocer Co. v. McKee Shoe Co., 87 Ill. App. 434; Kalbfell's Estate, 30 Pitts. L. J. (N. S.) (Pa.) 273, 27 Pitts. L. J. (N. S.) 210.

[99] Exchange Bank v. Tracey, 77 Mo. 594; Cock v. Carson, 45 Tex. 429.

[1] Castle v. Reynolds, 10 Watts (Pa.) 51; Jenness v. Carleton, 40 Mich. 343; Bank of Port Gibson v. Baugh, 17 Miss. 290.

[2] Bass Dry Goods Co. v. Granite City Mfg. Co., 116 Ga. 176, 42 S. E. 415.

[3] Rammelsberg v. Mitchell, 29 Ohio St. 22; Mitchell v. Schultz, 8 Ohio Dec. 78, 5 Wkly. L. Bul. 503; Ludlow v. Cooper, 4 Ohio St. 1; Hamilton v. Wells, 182 Ill. 144, 55 N. E. 143 (affg. 81 Ill. App. 274); Galbraith v. Tracy, 153 Ill. 54, 38 N. E. 937, 28 L. R. A. 129, 46 Am. St. 867; Valentine v. Wysor, 123 Ind. 47, 23 N. E. 1076, 7 L. R. A. 788; Wilson v. Soper, 13 B. Mon. (Ky.) 411, 56 Am. Dec. 573; Macready v. Schenck, 43 La. Ann. 479, 9 So. 470; Skipwith v. Lea, 16 La. Ann. 247; Welbourn v. Kleinle, 92 Md. 114, 48 Atl. 81; Robinson v. Simmons, 146 Mass. 167, 15 N. E. 558, 4 Am. St. 299; Lobeck v. Lee-Clarke-Andreesen Hardware Co., 37 Nebr. 158, 55 N. W. 650, 23 L. R. A. 795; Howell v. Wallace, 37 App. Div. 323, 56 N. Y. S. 280; Ogden v. Astor, 4 Sandf. (N. Y.) 311; Tennant v. Dunlop, 97

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provided for by the partnership agreement,[4] or by will.[5]

§ 636. **Interest and profits.**—Good faith employment of, and accounting for, partnership property in his possession during the period of settlement will undoubtedly relieve a surviving partner from liability for interest and profits.[6] After a reasonable time has elapsed for the settlement of firm affairs and the payment of debts, the surviving partner is sometimes held chargeable with interest on the deceased partner's share,[7] but not if there has been no unnecessary and unreasonable delay.[8] While surviving partners have the right to conduct the affairs of the firm, in closing up the business, and to keep the deceased partner's share until settled, if done in a reasonable time and manner, this is not, in the absence of an agreement therefor, an authority to so

Va. 234, 33 S. E. 620; Ex parte Sessions, 2 Ch. Chamb. (U. C.) 360.

[4] Rankin v. Newman, 114 Cal. 635, 46 Pac. 742, 34 L. R. A. 265; Brown v. Slee, 103 U. S. 828, 26 L. ed 618; Littell v. Hackley, 126 Fed. 309, 61 C. C. A. 295; Robertson v. Miller, 1 Brock. 466, Fed. Cas. No. 11926; Scharringhausen v. Luebsen, 52 Mo. 337; Sands v. Miner, 160 N. Y. 693, 55 N. E. 1100 (affg. 16 App. Div. 347, 44 N. Y. S. 894); Lowenstein v. Schiffer, 38 App. Div. 178, 56 N. Y. S. 674; Hull v. Cartledge, 18 App. Div. 54, 45 N. Y. S. 450; Jones v. Proctor, 5 Ohio N. P. 315; Kaufmann v. Kaufmann, 239 Pa. 42, 86 Atl. 634; In re Fleming, 184 Pa. St. 88, 39 Atl. 29; Cant v. Reed, 24 Tex. 46, 76 Am. Dec. 94; Ex parte Morley, L. R. 8 Ch. 1026; In re David [1899], 1 Ch. 378, 68 L. J. Ch. 185; Page v. Ratliffe, 76 L. T. Rep. (N. S.) 63; Hibben v. Collister, 30 Can. Sup. Ct. 459; Robertson v. Junkin, 26 Can. Sup. Ct. 192.

[5] Murphy v. Murphy, 217 Mass. 233, 104 N. E. 466.

[6] Maynard v. Richards, 166 Ill. 466, 46 N. E. 1138, 57 Am. St. 145; Gregory v. Menefee, 83 Mo. 413. See further Turner v. Turner (Ky.), 16 S. W. 137; Hite's Heirs v. Hite's Exrs., 1 B. Mon. (Ky.) 177.

[7] Porter v. Long, 136 Mich. 150, 98 N. W. 990, 4 Ann. Cas. 177; Washburn v. Goodman, 17 Pick. (Mass.) 519. See also Hite v. Hite, 1 B. Mon. (Ky.) 177; Bernie v. Vandever, 16 Ark. 616; Klotz v. Macready, 39 La. Ann. 638, 2 So. 203; Featherstonhaugh v. Turner, 25 Beav. 382; Oliver v. Forrester, 96 Ill. 315; Goodburn v. Stevens, 1 Md. Ch. 420; Killefer v. McLain, 78 Mich. 249, 44 N. W. 405; Perrin v. Lepper, 72 Mich. 454, 40 N. W. 859; Ramsdell v. Millerd, Harr. (Mich.) 373; Hannahs v. Hannahs, 68 N. Y. 610; In re Brown's Appeal, 89 Pa. St. 139.

[8] Harrah v. Dyer (Ind. App.), 96 N. E. 41; Turner v. Turner (Ky.), 16 S. W. 137; Gregory v. Menefee, 83 Mo. 413.

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retain the deceased partner's share for the purpose of continuing the business, and if they do so, in the event of making a profit, they must give the representatives of the deceased partner his share.[9] The business is conducted, by the surviving partners, at their own peril, and if there is a loss, or less than the legal rate of interest is made on the capital, the executor of the deceased partner has his option of requiring an account at the legal rate of interest instead of profits,[10] but, in exercising this option, the representative of the deceased partner must either base his claim for the whole period upon one or the other option. He can not take profits when profits are large, and interest when there are small profits or a loss. In case one of the surviving partners should acquire the interest of the deceased partner in the firm, and assents to a continuation of the partnership, the above rule does not apply, and he must stand upon the regular division of profits and losses, without the above option.[11] A surviving partner who continued the business is not entitled to interest on an excess in his share of capital owing to overdrafts made by the deceased partner.[12]

§ 637. **Compensation.**—Ordinarily the surviving partner is not entitled to compensation for his services in winding up and settling the partnership affairs, unless there is an agreement therefor, or special circumstances entitling him to such compensation.[13] Where he renders special or extraordinary services or

[9] McGibbon v. Tarbox, 144 App. Div. 837, 129 N. Y. S. 594, 98 N. E. 390, 205 N. Y. St. 271; Painter v. Painter, 133 Cal. xix, 65 Pac. 135 (1901); Oliver v. Forrester, 96 Ill. 315; Young v. Scoville, 99 Iowa, 177, 68 N. W. 670; Roberts v. Hendrickson, 75 Mo. App. 484; Rowell v. Rowell, 122 Wis. 1, 99 N. W. 473; Booth v. Parkes, Beatty 444; Eng. Partnership Act (1890), § 29 (2).

[10] Goodburn v. Stevens, 1 Md. Ch. 420.

[11] Millerd v. Ramsdell, Harr. (Mich.) 373; Harrah v. Dyer (Ind.), 102 N. E. 14.

[12] McGibbon v. Tarbox, 205 N. Y. 271, 98 N. E. 390 (revg. 144 App. Div. 837, 129 N. Y. S. 594).

[13] See ante § 352; Griggs v. Clark, 23 Cal. 427; Tillotson v. Tillotson, 34 Conn. 335; Kimball v. Lincoln, 5 Ill. App. 316; Young v. Scoville, 99 Iowa 177, 68 N. W. 670; Commonwealth v. Bracken (Ky.), 32 S. W. 609, 17 Ky. L. 785; Coakley v. Hazelwood, 21 Ky. L. 40, 49 S. W. 1067; Smith v. Smith, 51 La. Ann. 72, 24 So. 618;

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continues the business for some time with the acquiescence of the deceased partner's relatives, or under order of court, there may be a right to compensation.[14] The old English rule, as given by Mr. Lindley[15] gave the right to the surviving partner to collect from the firm for his services in carrying on the business for the benefit of the deceased partner's estate, unless such surviving partner was also an executor, in which case he could not so collect. In most American states now a surviving partner who is also the deceased partner's executor can not recover com-

Sangston v. Hack, 52 Md. 173; Porter v. Long, 124 Mich. 584, 83 N. W. 601; Loomis v. Armstrong, 49 Mich. 521, 14 N. W. 505; Scudder v. Ames, 89 Mo. 496, 14 S. W. 525; Gregory v. Menefee, 83 Mo. 413; Burgess v. Badger, 83 Hun 488, 31 N. Y. S. 614, 64 N. Y. St. 327; Slater v. Slater, 78 App. Div. 449, 80 N. Y. S. 363; Beatty v. Wray, 19 Pa. St. 516, 57 Am. Dec. 677; Piper v. Smith, 1 Head (Tenn.) 93; Patton v. Calhoun, 4 Grat. (Va.) 138; note to Shields v. Fuller, 4 Wis. 102, 65 Am. Dec. 293. See also Smith v. Knight, 88 Iowa 257, 55 N. W. 189; Colgin v. Cummins, 1 Port. (Ala.) 148; Maynard v. Richards, 166 Ill. 466, 46 N. E. 1138, 57 Am. St. 145 (affg. 61 Ill. App. 336); Justice v. Lairy, 19 Ind. App. 272, 49 N. E. 459, 65 Am. St. 405; Coakley v. Hazelwood, 21 Ky. L. 40, 49 S. W. 1067; Hite v. Hite, 1 B. Mon. (Ky.) 177; Roberts v. Hendrickson, 75 Mo. App. 484; Clausen v. Puvogel, 114 App. Div. 455, 100 N. Y. S. 49; Slater v. Slater, 78 App. Div. 449, 80 N. Y. S. 363 (judgment mod. on another point in 175 N. Y. 143, 67 N. E. 224, 61 L. R. A. 796, 96 Am. St. 605); Ames v. Downing, 1 Bradf. Sur. (N. Y.) 321; McCullough v. Barr, 145 Pa. St. 459, 22 Atl. 962; Brown v. McFarland, 41 Pa. St. 129, 80 Am. Dec. 598; Robertson v. Schwenk, 18 Pa. Co. Ct. 577; Galbraith's Estate, 12 Phila. (Pa.) 20; Condon v. Callahan, 115 Tenn. 285, 89 S. W. 400, 1 L. R. A. (N. S.) 643, 112 Am. St. 833; Godfrey v. Templeton, 86 Tenn. 161, 6 S. W. 47; Berry v. Jones, 11 Heisk. (Tenn.) 206, 27 Am. Rep. 742; Frazier v. Frazier, 77 Va. 775; Lennig v. Lennig, 11 W. N. C. 18.

[14] McGibbon v. Tarbox, 144 App. Div. 837, 129 N. Y. S. 594, 205 N. Y. 271, 98 N. E. 390; Peck v. Knapp, 137 N. Y. S. 70; Painter v. Painter (Cal.), 36 Pac. 865; Griggs v. Clark, 23 Cal. 427; Jones v. Marshall, 24 Idaho 678, 135 Pac. 841; Maynard v. Richards, 166 Ill. 466, 46 N. E. 1138, 57 Am. St. 145; Harrah v. Dyer (Ind. App.), 96 N. E. 41; Hite v. Hite, 1 B. Mon. (Ky.) 177; Hancock v. Hancock, 24 Ky. L. 664, 69 S. W. 757; Schenkl v. Dana, 118 Mass. 236; Royster v. Johnson, 73 N. Car. 474; Cameron v. Francisco, 26 Ohio St. 190; In re Zell's Appeal, 126 Pa. St. 329, 17 Atl. 647; Evans v. Weatherhead, 24 R. I. 394, 53 Atl. 286; Godfrey v. Templeton, 86 Tenn. 161, 6 S. W. 47; Newell v. Humphrey, 37 Vt. 265; Hanks v. Wilcox, 2 Haw. 509.

[15] Lindley Partnership, 593.

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pensation for winding up the business.[16] A California case[17] holds that a surviving partner, who has conducted the business for a considerable time after the death of his copartner, and such continuance has been advantageous, is entitled to compensation for his services, which shall be deducted from the profits before division of the same. The financial result of the surviving partner's activities does not, however, necessarily determine the question as to his right to receive compensation for his services.[18] It is also said that in the case of a nontrading partnership, such as one between attorneys, the rule as to noncompensation for services of a surviving partner should not apply, as in case of a commercial partnership,[19] but such distinction is not upheld by most cases.[20] And it is often held that a surviving partner who continues the business is not entitled to compensation where there is no express agreement,[21] though a good many other decisions have allowed compensation to him where the continuation of the business was profitable.[22] Nor is compensation usually

[16] Terrell v. Rowland, 86 Ky. 67, 4 S. W. 825, 9 Ky. L. 258; Scudder v. Ames, 89 Mo. 496, 14 S. W. 525; Roberts v. Hendrickson, 75 Mo. App. 484; In re Tutt, 41 Mo. App. 662; Matter of Dummett, 38 Misc. 477, 77 N. Y. S. 1118; In re Harris, 4 Dem. Sur. (N. Y.) 463, 1 N. Y. St. 331.

[17] Griggs v. Clark, 23 Cal. 427. See also Wood v. Wood, 26 Barb. (N. Y.) 356.

[18] Lee v. Dolan, 12 Stew. (N. J.) 193.

[19] Sterne v. Goep, 20 Hun 396 (affd. 84 N. Y. 641).

[20] Denver v. Roane, 99 U. S. 355, 25 L. ed. 476; Little v. Caldwell, 101 Cal. 553, 36 Pac. 107, 40 Am. St. 89; Osment v. McElrath, 68 Cal. 466, 9 Pac. 731, 58 Am. Rep. 17; Justice v. Lairy, 19 Ind. App. 272, 49 N. E. 459, 65 Am. St. 405; Starr v. Case, 59 Iowa 491, 13 N. W. 645; Lamb v. Wilson, 3 Nebr. (Unof.) 496, 92 N. W. 167. See also Clifton v. Clark, 83 Miss. 446, 36 So. 251, 66 L. R. A. 821, 102 Am. St. 458.

[21] Kimball v. Lincoln, 5 Ill. App. 316 (affd. 99 Ill. 578); Young v. Scoville, 99 Iowa 177, 68 N. W. 670; Smith v. Smith, 51 La. Ann. 72, 24 So. 618; In re Taft, 55 Hun 603, 8 N. Y. S. 282, 28 N. Y. St. 315, 5 Silv. 370; Buford v. Neely, 17 N. Car. 481; Cameron v. Francisco, 26 Ohio St. 190; Beatty v. Wray, 19 Pa. St. 516, 57 Am. Dec. 677; Godfrey v. Templeton, 86 Tenn. 161, 6 S. W. 47; Newell v. Humphrey, 37 Vt. 265; Patton v. Calhoun, 4 Grat. (Va.) 138; In re Aldridge (1894), 2 Ch. 97.

[22] Yates v. Finn, L. R. 13 Ch. Div. 839; Willett v. Blanford, 1 Hare 253; Featherstonhaugh v. Turner, 25 Beav. 382; Griggs v. Clark, 23 Cal. 427; McElroy v. Whitney, 12 Idaho 512, 88 Pac. 349; Robinson v. Sim-

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granted for services rendered in completing firm contracts,[23] although under other circumstances where large services were entailed, compensation has been allowed.[24] Ordinarily, compensation is not allowed where the business is carried on under testamentary direction,[25] except by consent of the executors or heirs.[26] Nor may a surviving partner who is also the executor of the deceased partner's estate recover from the estate for settling up the business of the firm,[27] though he may recover the statutory commission or allowance for administering the deceased's estate.[28] And it has also been held that a surviving partner appointed as receiver of the business has no right to compensation.[29] Summing up the subject, "there is a disinclination to allow pay to a surviving partner for winding up; but the tendency is to deal with such questions on their particular cir-

mons, 146 Mass 167, 15 N. E. 558, 4 Am. St. 299; Godfrey v. Templeton, 86 Tenn. 161, 6 S. W. 47; Cameron v. Francisco, 26 Ohio St. 190; Frazier v. Frazier, 77 Va. 775; Rowell v. Rowell, 122 Wis. 1, 99 N. W. 473.

[23] Little v. Caldwell, 101 Cal. 553, 36 Pac. 107, 40 Am. St. 89; Porter v. Long, 124 Mich. 584, 83 N. W. 601.

[24] Justice v. Lairy, 19 Ind. App. 272, 49 N. E. 459, 65 Am. St. 405; Schenkl v. Dana, 118 Mass. 236; Cameron v. Francisco, 26 Ohio St. 190; Brown v. McFarland, 41 Pa. St. 129, 80 Am. Dec. 598; Condon v. Callahan, 115 Tenn. 285, 89 S. W. 400, 1 L. R. A. (N. S.) 643, 112 Am. St. 833.

[25] Tillotson v. Tillotson, 34 Conn. 335; Berry v. Folkes, 60 Miss. 576; Evans v. Weatherhead, 24 R. I. 394, 53 Atl. 286.

[26] In re Bach, 2 Connoly Sur. 490, 12 N. Y. S. 712; Kimball v. Lincoln, 5 Ill. App. 316 (affd. 99 Ill. 578); Barber v. Murphy, 23 Ky. L. 286, 62 S. W. 894.

[27] Pickens' Estate, 14 W. N. C. 407; Terrell v. Rowland, 86 Ky. 67, 4 S. W. 825, 9 Ky. L. 258; Ames v. Downing, 1 Bradf. Sur. (N. Y.) 321; In re Harris, 4 Dem. Sur. (N. Y.) 463; Dodson v. Dodson, 6 Heisk. (Tenn.) 110; Burden v. Burden, 1 Ves. & B. 170.

[28] Gregory v. Menefee, 83 Mo. 413; Roberts v. Hendrickson, 75 Mo. App. 484; In re Tutt, 41 Mo. App. 662; Clausen v. Puvogel, 114 App. Div. 455, 100 N. Y. S. 49; In re Dummett, 38 Misc. 477, 77 N. Y. S. 1118; In re Allen's Appeal, 125 Pa. St. 544, 17 Atl. 453; Beatty v. Wray, 19 Pa. St. 516, 57 Am. Dec. 677; Frazier v. Frazier, 77 Va. 775; Brown v. Tastet, Jacob 284; Stocken v. Dawson, 6 Beav. 371; Cockerell v. Barber, 2 Russ. Ch. 585.

[29] Berry v. Jones, 11 Heisk. (Tenn.) 206, 27 Am. Rep. 742. See also Lennig v. Lennig, 11 W. N. C. 18. But compare Davy v. Scarth [1906], 1 Ch. 55, which allowed the partner who acted as receiver an agreed remuneration.

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cumstances rather than by absolute rules."[30] The Uniform Partnership Act allows the surviving partner reasonable compensation for winding up firm affairs.[31]

§ 638. Continuation of business by surviving partner.—As was stated in a former section, a surviving partner has no authority to continue the business, but must wind it up,[32] and if he does continue it he is answerable for all debts which he incurs,[33] and for loss and depreciation thus occasioned.[34] It is often provided, however, by the partnership articles that the business shall continue on the death of a partner,[35] and the provision is often found that the personal representatives or heirs of the deceased may become partners, which, however, does not bind them to enter the firm, but only gives them the option of so doing,[36] and they have a right to refuse to enter the firm, even

[30] Thayer v. Badger, 171 Mass. 279, 50 N. E. 541.

[31] Uniform Partnership Act, § 18 (f).

[32] Perin v. Megibben, 53 Fed. 86, 13 C. C. A. 443; Adams v. Ward, 26 Ark. 135; McElroy v. Whitney, 12 Idaho 512, 88 Pac. 349; Remick v. Emig, 42 Ill. 342; Powell v. North, 3 Ind. 392, 56 Am. Dec. 513; Williams v. Brookline, 194 Mass. 44, 79 N. E. 779; Frey v. Eisenhardt, 116 Mich. 160, 74 N. W. 501; Stewart v. Robinson, 115 N. Y. 328, 22 N. E. 160, 163, 5 L. R. A. 410; Collender v. Phelan, 79 N. Y. 366; Dawson v. Parsons, 21 N. Y. S. 212 (affg. 20 N. Y. S. 65); Evans v. Evans, 9 Paige (N. Y.) 178; Egberts v. Wood, 3 Paige (N. Y.) 517, 24 Am. Dec. 236; Holden v. McMakin, 1 Pars. Eq. Cas. (Pa.) 270; Weld v. Johnson Mfg. Co., 86 Wis. 552, 57 N. W. 374; Evans v. Hughes, 18 Jur. 691; Myers v. Myers, 60 L. J. Ch. 311; Hills v. Reeves, 31 Wkly. Rep. 209 (affg. 30 Wkly. Rep. 439). See ante §§ 615-618.

[33] Juliand v. Watson, 43 N. Y. 571; Staats v. Howlett, 4 Den. (N. Y.) 559.

[34] Roberts v. Hendrickson, 75 Mo. App. 484; Hooley v. Gieve, 9 Abb. N. Cas. 8, 9 Daly (N. Y.) 104 (affd. 82 N. Y. 625).

[35] Butler v. American Toy Co., 46 Conn. 136; Rand v. Wright, 141 Ind. 226, 39 N. E. 447; Hart v. Anger, 38 La. Ann. 341; In re Shaw, 81 Maine 207, 16 Atl. 662; Edwards v. Thomas, 66 Mo. 468; Stewart v. Robinson, 115 N. Y. 328, 22 N. E. 160, 163, 5 L. R. A. 410; Lane v. Arnold, 99 N. Y. 648 (revg. 11 Daly 293, 13 Abb. N. Cas. 73, affg. 63 How. Pr. 40); Matter of Marx, 106 App. Div. 212, 94 N. Y. S. 151; Matter of Laney, 50 Hun 15, 2 N. Y. S. 443, 18 N. Y. St. 463 (affd. 119 N. Y. 607, 23 N. E. 1143); Evans v. Watts, 192 Pa. St. 112, 43 Atl. 464; Alexander v. Lewis, 47 Tex. 481; McNeish v. United States Hulless Oat Co., 57 Vt. 316.

[36] Louisiana Bank v. Kenner, 1 La.

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if the decedent's estate becomes subject to damages for breach of the partnership contract.[37] It is also competent to provide by will for the carrying on of a partnership business after one partner's death,[38] or even by parol agreement between the partners while all were living.[39] If the business is continued by the surviving partner and the representatives of the deceased, a new firm is formed, it is held, and it is not merely a continuation of the old, even though authorized by the partnership agreement or the deceased partner's will.[40] It follows, from the general rules of partnership law as to assumption of debts upon change in the membership of a firm, that the new members of the firm are not liable for the debts of the old firm.[41] It is said:[42] "Where an executor thus engages in carrying on the business, it is usually spoken of as a continuance of the partnership, but it is incorrect to so term it. It is necessarily the creation of a new partnership,

384; Wild v. Davenport, 48 N. J. L. 129, 7 Atl. 295, 57 Am. Rep. 552; Evans v. Watts, 192 Pa. St. 112, 43 Atl. 464; Holland v. King, 6 C. B. 727, 60 E. C. L. 727; Downs v. Collins, 6 Hare 418, 31 Eng. Ch. 418, 67 Eng. Reprint 1228; Piggott v. Bagley, McClell. & Y. 569, 29 Rev. Rep. 850.

[37] Stearns v. Inhabitants of Brookline (Mass.), 107 N. E. 57; Burwell v. Cawood, 2 How. (U. S.) 560, 11 L. ed. 378; Reeve v. Lisle [1902], A. C. 461, 71 L. J. Ch. 768; Downs v. Collins, 6 Hare 418, 31 Eng. Ch. 418, 67 Eng. Reprint 1228; Lancaster v. Allsup, 57 L. T. N. S. 53.

[38] Jones v. Walker, 103 U. S. 444, 26 L. ed. 404; Smith v. Ayer, 101 U. S. 320, 25 L. ed. 955; Burwell v. Cawood, 2 How. (U. S.) 560, 11 L. ed. 378; Andrews v. Stinson, 254 Ill. 111, 98 N. E. 222; Murphy v. Murphy, 217 Mass. 233, 104 N. E. 466; In re Allen's Appeal, 125 Pa. St. 544, 17 Atl. 453; see ante § 615.

[39] Stearns v. Inhabitants of Brookline (Mass.), 107 N. E. 57.

[40] Lee v. Wimberly, 102 Ala. 539, 15 So. 444; Vincent v. Martin, 79 Ala. 540; Pitkin v. Pitkin, 7 Conn. 307, 18 Am. Dec. 111; Andrews v. Stinson, 254 Ill. 111, 98 N. E. 222, Ann. Cas. 1913 B, 927; compare Rand v. Wright, 141 Ind. 226, 39 N. E. 447; Hornaday v. Cowgill, 54 Ind. App. 631, 101 N. E. 1030; Insley v. Shire, 54 Kans. 793, 39 Pac. 713, 45 Am. St. 308; Ellis v. Johnson, 4 Ky. L. (abstract) 991; Mattison v. Farnham, 44 Minn. 95, 46 N. W. 347; Kennedy v. Porter, 109 N. Y. 526, 17 N. E. 426, 16 N. Y. St. 613; Matter of Laney, 50 Hun 15, 2 N. Y. S. 443; McGrath v. Cowen, 57 Ohio St. 385, 49 N. E. 338; Wilcox v. Derickson, 168 Pa. St. 331, 31 Atl. 1080; Pemberton v. Oakes, 4 Russ. 154, 6 L. J. Ch. 35, 4 Eng. Ch. 154, 38 Eng. Rep. (Reprint) 763.

[41] See cases cited in preceding note.

[42] Mattison v. Farnham, 44 Minn. 95, 46 N. W. 347.

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in which the executor takes the place of the deceased partner, and it is elementary law that a person becoming a member of an existing firm, or forming a partnership with another in the latter's existing business, does not thereby become liable for the debts already incurred, nor does the new firm become liable for them. An agreement, express or implied, is necessary to create such liability, not only between the creditors and the new firm, but also between the partners." There are some cases in which statements seemingly opposed to the rule just mentioned are found, but in none of them was the point directly in dispute, and it seems that the real effect of the holding is merely that there is a continuing business, and not that the same partnership continued, and there is no real conflict.[43] In Missouri a partnership business continued because of a direction in a will is the creation of a new partnership,[44] but if there is a term fixed by the articles of partnership for the continuation of a partnership after death of a partner such partnership continues until the expiration of such fixed period, if it is agreed that the partnership shall continue.[45] In New York, where a deceased partner's interest was bequeathed in trust to be continued in the partnership business, it was held no new firm was created, but that the survivors were to continue the business, using the capital of the deceased partner.[46] It has been held that a partner who retired from the firm prior to the death of a partner, though he did not follow the prescribed method of retirement, yet is not liable

[43] Burwell v. Cawood, 2 How. (U. S.) 560, 11 L. ed. 378; Lincoln v. Orthwein, 120 Fed. 880, 57 C. C. A. 540; Duffield v. Brainerd, 45 Conn. 424; Ferris v. Van Ingen, 110 Ga. 102, 35 S. E. 347; Schmidt v. Archer, 113 Ind. 365, 14 N. E. 543; Parnell v. Thompson, 81 Kans. 119, 105 Pac. 502, 33 L. R. A. (N. S.) 658; Evans v. Watts, 192 Pa. St. 112, 43 Atl. 464; Mason v. Slevin, 1 White & W. Civ. Cas. Ct. App. (Tex.) § 11; McNeish v. United States Hulless Oat Co., 57 Vt. 316; Davis v. Christian, 15 Grat. (Va.) 11.

[44] Bank v. Tracy, 77 Mo. 594; Hawkins v. Quinette, 156 Mo. App. 153, 136 S. W. 246.

[45] Edwards v. Thomas, 66 Mo. 468; Hax v. Burnes, 98 Mo. App. 707, 73 S. W. 928; Farmers &c. Sav. Inst. v. Garesche, 12 Mo. App. 584.

[46] Costello v. Costello, 209 N. Y. 252, 103 N. E. 148 (affg. judgment 152 App. Div. 280, 137 N. Y. S. 132).

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for debts contracted subsequent to the death of the partner, since this worked a dissolution of the old firm and the creation of a new one, although the remaining partners continued the business under provision in the articles, that, "the law in relation to surviving partners is hereby waived, and that the business shall be carried on the same as if such death had not occurred, until the expiration of the term of partnership."[47] However, the holdings as to the formation of a new firm, on continuance of the business after death of a partner, are not fully supported by cases which hold that a provision in a will or in partnership articles for the partnership to continue for a specified time, even if one partner's death occurs before the expiration of such time, binds a deceased partner's estate only for the amount of the capital then in the business.[48] In one of the cases where there was a provision in the partnership articles that "the surviving partner shall continue the business for the unexpired term," it was said:[49] "It is clear that partners can make a valid and binding agreement that in the event of the death of one or more of the members of the firm, the business shall be continued by the survivor, employing for the purpose the united capital which had constituted the partnership effects. That is precisely what we think the contract of partnership in this case contemplated. The result of such agreement and direction is, that the survivor can fasten no new debt or liability on the estate of the partner not carried previously into the adventure as part of the stock. He can use only the partnership effects as they were in the firm when his copartner died. Over these, however, his control is unlimited." And under other provisions of partnership articles

[47] Hornaday v. Cowgill, 54 Ind. App. 631, 101 N. E. 1030.

[48] Steiner v. Steiner Land &c. Co., 120 Ala. 128, 26 So. 494; Burwell v. Cawood, 2 How. (U. S.) 560, 11 L. ed. 378; Ferris v. Van Ingen, 110 Ga. 102, 35 S. E. 347; Barber v. Murphy, 62 S. W. 894, 23 Ky. L. 286; Wild v. Davenport, 48 N. J. L. 129, 7 Atl. 295, 27 Am. Rep. 552; Stewart v. Robinson, 115 N. Y. 328, 22 N. E. 160, 163, 5 L. R. A. 410; National Bank v. Bigler, 83 N. Y. 51; In re Talmage, 39 App. Div. 466, 57 N. Y. S. 427 (affd. 161 N. Y. 643, 57 N. E. 1126); Roessler's Estate, 5 Pa. Dist. 776, 19 Pa. Co. Ct. 161; Smith v. Smith, 13 Grant Ch. (U. C.) 81.

[49] Vincent v. Martin, 79 Ala. 540.

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it has been held that the entire estate is chargeable with the debts of the partnership incurred after his death.[50] If a new firm is organized and the survivor passes title to the firm property to it, this extinguishes his right to such property as surviving partner.[51] But if the survivor merely mingles firm assets with his own and continues the business, the firm creditors have a right to share in the entire assets.[52] A continuance of the business by one of the surviving partners without authority, does not subject the others to liability.[53] As was seen, a survivor who continues the business as such is liable for all loss sustained,[54] and must share profits with the deceased partner's estate.[55] A surviving partner, who has already accounted as such, can not be compelled to make a further accounting as to affairs of a new firm formed by him and the personal representatives of the deceased.[56]

§ 639. Rights and liabilities of deceased partner's estate, his heirs, and personal representatives, on continuation of business.—The decedent's estate is liable for the surviving partner's acts in winding up the firm business, if within the scope of his authority as such,[57] but not for acts in the incurring of

[50] Ferris v. Van Ingen, 110 Ga. 102, 35 S. E. 347; Willis v. Sharp, 113 N. Y. 586, 21 N. E. 705, 4 L. R. A. 493; Laughlin v. Lorenz, 48 Pa. St. 275, 86 Am. Dec. 592; Ussery v. Crusman (Tenn. Ch. App.), 47 S. W. 567 (1898).

[51] Lee v. Wimberly, 102 Ala. 539, 15 So. 444; Stanford v. Lockwood, 95 N. Y. 582.

[52] Moyers v. Cummings, 17 App. Cas. (D. C.) 269; Bollenbacher v. First Nat. Bank, 8 Ind. App. 12, 35 N. E. 403; Tufts v. Latshaw, 172 Mo. 359, 72 S. W. 679; Hooley v. Gieve, 82 N. Y. 625 (affg. 9 Abb. N. Cas. 8, 9 Daly 104); Spaulding v. Stubbings, 86 Wis. 255, 56 N. W. 469, 39 Am. St. 888; Ex parte Harper, 1 DeG. & J. 180.

[53] Cooper v. Burns, 6 La. Ann. 739; Matteson v. Nathanson, 38 Mich. 377.

[54] Harrah v. Dyer, 180 Ind. 229, 102 N. E. 14; Dexter v. Dexter, 43 App. Div. 268, 60 N. Y. S. 371; Booth v. Parks, 1 Molloy 465. See ante §§ 615-618.

[55] Harrah v. Dyer, 180 Ind. 229, 102 N. E. 14; Bell v. McCoy, 136 Mo. 552, 38 S. W. 329; In re Welch, 77 Misc. 427, 137 N. Y. S. 941; Yates v. Finn, 13 Ch. D. 839, 49 L. J. Ch. 188, 28 Wkly. Rep. 387; Clements v. Hall, 2 DeG. & J. 173, 4 Jur. (N. S.) 494; Townend v. Townend, 1 Gifford 201, 5 Jur. (N. S.) 506.

[56] Andrews v. Stinson, 254 Ill. 111, 98 N. E. 222; Stinson v. Andrews, 166 Ill. App. 92. See ante § 631, post § 641.

[57] Mason v. Tiffany, 45 Ill. 392; McGill v. McGill, 2 Metc. (Ky.) 258;

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new obligations.[58] Only the share of the deceased partner's estate which was in the firm at his death will be liable for acts of the executor in continuing the business under the partnership articles or will,[58a] unless it is clearly provided that the entire estate shall be liable.[59] The personal representative of the deceased is not personally liable for debts, on the continuance of the business by the surviving partner, unless he becomes a partner,[60] and in such event, if authorized by the deceased to become a partner, he can require indemnity from the estate to the extent of the decedent's interest in the partnership.[61] A personal

Hawk v. Johnson, 3 Sad. (Pa.) 511, 6 Atl. 725; Winter v. Innes, 2 Jur. 981, 4 Myl. & C. 101; Sleech's Case, 1 Meriv. 539, 15 Rev. Rep. 155; Devaynes v. Noble, 2 Russ. & M. 495; Daniel v. Cross, 3 Ves. Jr. 277, 3 Rev. Rep. 94.

[58] Pyke v. Searcy, 4 Port. (Ala.) 52; Oliver v. Forrester, 96 Ill. 315 (revg. 1 Ill. App. 259); Stanwood v. Owen, 14 Gray (Mass.) 195; Citizens' Mut. Ins. Co. v. Ligon, 59 Miss. 305; Stewart v. Robinson, 115 N. Y. 328, 22 N. E. 160, 163, 5 L. R. A. 410; Tompkins v. Tompkins, 18 S. Car. 1; Tootle v. Jenkins, 82 Tex. 29, 17 S. W. 519; Clark v. Bickers, 9 Jur. 678, 14 Sim. 639; Houlton's Case, 1 Meriv. 615, 15 Rev. Rep. 169; Eng. Partnership Act (1890), § 36.

[58a] Vincent v. Martin, 79 Ala. 540; Jones v. Walker, 103 U. S. 444, 26 L. ed. 404; Smith v. Ayer, 101 U. S. 320, 25 L. ed. 955; Burwell v. Cawood, 2 How. (U. S.) 560, 11 L. ed. 378; Pitkin v. Pitkin, 7 Conn. 307, 18 Am. Dec. 111; Rand v. Wright, 141 Ind. 226, 39 N. E. 447; Brasfield v. French, 59 Miss. 632; Stewart v. Robinson, 115 N. Y. 328, 22 N. E. 160, 163, 5 L. R. A. 410 (affg. 48 Hun 327, 2 N. Y. S. 309, 21 Abb. N. Cas. 63, 15 N. Y. St. 830); Peters v. Campbell, 2 Ohio Dec. 526; Wilcox v. Derickson, 168 Pa. St. 331, 31 Atl. 1080.

[59] Blodgett v. American Nat. Bank, 49 Conn. 9; Burwell v. Cawood, 2 How. (U. S.) 560, 11 L. ed. 378; Cook v. Rogers, 3 Fed. 69; Phillips v. Blatchford, 137 Mass. 510; Stewart v. Robinson, 115 N. Y. 328, 22 N. E. 160, 163, 5 L. R. A. 410; Davis v. Christian, 15 Grat. (Va.) 11.

[60] Alsop v. Mather, 8 Conn. 584, 21 Am. Dec. 703; Edgar v. Cook, 4 Ala. 588; Galbraith v. Tracy, 153 Ill. 54, 38 N. E. 937, 28 L. R. A. 129, 46 Am. St. 867; Walker v. Walker, 88 Ky. 615, 11 S. W. 718, 11 Ky. L. 80; Owens v. Mackall, 33 Md. 382; City Nat. Bank v. Stone, 131 Mich. 588, 92 N. W. 99; Mattison v. Farnham, 44 Minn. 95, 46 N. W. 347; Avery v. Myers, 60 Miss. 367; Citizens' Mut. Ins. Co. v. Ligon, 59 Miss. 305; Wild v. Davenport, 48 N. J. L. 129, 7 Atl. 295, 57 Am. Rep. 552; Johnson v. Kellog, 44 Hun 623, 8 N. Y. St. 413; In re Talmage, 161 N. Y. 643, 57 N. E. 1126; Tisch v. Rockafellow, 209 Pa. St. 419, 58 Atl. 805; Lovell v. Gibson, 19 Grant Ch. (U. C.) 280.

[61] Burwell v. Cawood, 2 How. (U. S.) 560, 11 L. ed. 378; In re Johnson, 15 Ch. D. 548, 49 L. J. Ch. 745,

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representative has no right to interfere with the winding up of the business by the surviving partner, unless there is danger of loss to the deceased partner's estate from mismanagement.[62] The heirs of an intestate partner and his next of kin are entitled to his share.[63] The devisees and legatees of a testate partner are entitled to receive his interest from the surviving partner.[64] Even if such interest remains as a part of the firm assets the heirs, devisees or legatees are not liable for debts created by the surviving partner,[65] and are not liable for firm debts unless they become partners.[66] The provisions of the Uniform Partnership Act as to the rights of the deceased partner's estate on continuation of the business are the following:[67] "When any partner retires or dies, and the business is continued under any of the conditions set forth in section 41 (1, 2, 3, 5, 6), or section 38 (2b), without any settlement of accounts as between him or his estate and the person or partnership continuing the business, unless otherwise agreed, he or his legal representative as against such persons or partnership, may have the value of his interest at the date of dissolution ascertained, and shall receive as an ordinary creditor an amount equal to the value of his interest in the dissolved partnership with interest, or, at his option or at the option of his legal representative, in lieu of interest, the profits attributable to the use of his right in the property of the dissolved partnership; provided, that the creditors of the dissolved partnership as against the separate creditors, or the representative of the retired or deceased partner, shall have priority on any claim arising under this section as provided by section 41 (8) of this act."

43 L. T. Rep. (N. S.) 372, 29 Wkly. Rep. 168.

[62] Huggins v. Huggins, 117 Ga. 151, 43 S. E. 759.

[63] Robinson v. Simmons, 146 Mass. 167, 15 N. E. 558, 4 Am. St. 299.

[64] Jones v. Walker, 103 U. S. 444, 26 L. ed. 404; Procter v. Procter, 1 Ohio S. & C. Pl. Dec. 651, 1 Ohio N. P. 44; Dulaney v. Elford, 29 S. Car. 19, 6 S. E. 855.

[65] Pitkin v. Pitkin, 7 Conn. 307, 18 Am. Dec. 111.

[66] Frazer v. Howe, 106 Ill. 563; Nave v. Sturges, 5 Mo. App. 557.

[67] Uniform Partnership Act, § 42.

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§ 640. Executors of deceased partners.—As a general rule, executors of a deceased partner do not become partners in the firm. It has been held, however, that where the articles of partnership provide that on the death of a partner his executor or personal representative or some other person shall be entitled to the place of the deceased partner in the firm, with the capital of the deceased partner in the firm business, this is binding upon the surviving partner, but optional with the executor.[68] This, however, depends almost wholly upon the contract of partnership, and if the partnership articles provide absolutely that the deceased partner's capital shall remain in the business for the full term of the partnership, then this is binding both upon the surviving partner and upon the executor. The general rule may be stated, that the executor does not, by reason of his office alone, become a partner in the late partnership, nor is he, in most jurisdictions, entitled to administer the assets, but it is equally well established that he so far succeeds to the rights of his decedent as to have the right to an accounting in the interest of the estate of the deceased partner, from the surviving partner.[68a] The representative of the deceased partner may invoke the aid of a court of equity in enforcing their rights to a proper account from the surviving partner, and in compelling him to distribute the deceased partner's interest in the firm to the parties entitled thereto, including creditors of the firm.[69] Whenever all debts of the firm are paid, the executors of a deceased partner have the right to have the assets turned into money, if possible, and to have the share of the deceased partner turned over to them.[70] Of course, if it is impossible or impracticable to have the goods turned into money, the executor would still be entitled to his decedent's share, in kind. As heretofore stated, under a

[68] Wild v. Davenport, 48 N. J. L. 129, 7 Atl. 295, 57 Am. Rep. 552 (1886). See § 158 on partnership by representation.

[68a] Lindley Partnership, pp. 591, 592; Egberts v. Wood, 3 Paige (N. Y.) 517, 24 Am. Dec. 236; Freeman v. Freeman, 136 Mass. 260.

[69] People v. White, 11 Ill. 341; Emerson v. Senter, 118 U. S. 3, 30 L. ed. 49, 6 Sup. Ct. 981; Jones v. Dexter, 130 Mass. 380, 39 Am. Rep. 459.

[70] Lindley Partnership, p. 592.

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former topic, the good-will of a partnership is an asset or at least may be so, if salable, and in such case must be accounted for to the estate of the deceased partner. While in some jurisdictions, under certain conditions, the surviving partners may take the assets, or certain of them, at an appraised valuation, in no jurisdiction can the executors or a court, in the absence of a contract of partnership, compel the surviving partners to purchase such deceased partner's share, or a part thereof.[71] An executor assumes, personally, in the absence of instructions by the deceased, or of the beneficial representatives of the deceased, the risk of leaving the property of his deceased in the firm, to be used in the firm as a going concern, though an executor, as such, does not, under ordinary circumstances, become a partner in the firm of his decedent, yet he may personally assume such liabilities by allowing the continuation of the business. As Mr. Lindley aptly says: "The position of the executors of a deceased partner is, in fact, often one of considerable hardship and difficulty; if they insist on an immediate winding up of the firm, they may ruin those whom the deceased may have been most anxious to benefit; whilst if for their advantage the partnership is allowed to go on, the executors may run the risk of being ruined themselves."[72] This was particularly so, as they could not, in case of successful operation, be entitled to any part of the profits, as such. This difficulty is obviated, to a certain extent, where, as in Ohio, a receiver may be appointed, who works as an officer of, and subject to, the court. A surviving partner may also be executor of his deceased partner's estate, but is handicapped in the exercise of his duties, as the two positions involve different and often conflicting duties and rights.[73]

§ 641. Accounting by surviving partner.—To whatever extent a surviving partner carries on the business, whether it be merely to finish existing contracts, or by virtue of the partnership articles, he must account to the deceased partner's represent-

[71] Dougherty v. Van Nostrand, 1 Hoffm. Ch. (N. Y.) 68.

[72] Lindley Partnership, p. 593.

[73] See ante § 633.

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atives for the profits.[74] For any unauthorized carrying on of the business, these representatives have an election to take the profits, or compel the survivor to pay interest on the capital of the deceased partner.[75] Since the relationship between the deceased partner's representatives and the surviving partner is a fiduciary one, he is held to a strict accounting.[76] But where the surviving partner makes a fair settlement, all parties are bound, unless there is a mistake.[77]

§ 642. Rights of creditors.—Where the business is carried on after death of a partner by the surviving partner or a new firm under the Uniform Partnership Act, section 41, the creditors of a dissolved firm have the same rights in firm assets as the creditors of the person or firm carrying on the business. Creditors who have become such after death of the partner, as well as creditors of the firm before that time, have a prior right in firm assets over personal creditors of the surviving partner.[78] An honest and good-faith purchase of the assets of the old firm by a

[74] Harbster's Appeal, 125 Pa. St. 1, 17 Atl. 204; De Haven v. Anjer (Pa.), 6 Atl. 768, 4 Sad. 183; Carroll v. Alston, 1 S. Car. 7; McClean v. Kennard, L. R. 9 Ch. 336, 43 L. J. Ch. 323.

[75] McGibbon v. Tarbox, 144 App. Div. 837, 129 N. Y. S. 594; Clay v. Field, 138 U. S. 464, 11 S. Ct. 419, 34 L. ed. 1044; Bernie v. Vandever, 16 Ark. 616; Huggins v. Huggins, 117 Ga. 151, 43 S. E. 759; Douthart v. Logan, 190 Ill. 243, 60 N. E. 507 (affg. 86 Ill. App. 294); Goodburn v. Stevens, 1 Md. Ch. 420; Millerd v. Ramsdell (Mich.), Harr. 373; Beck v. Thompson, 22 Nev. 109, 36 Pac. 562; Haynes v. Brooks, 8 Civ. Proc. (N. Y.) 106; In re Brown's Appeal, 89 Pa. St. 139; Franklin v. Tonjours, 1 Tex. App. Civ. Cas., § 506; Brown v. De Tastet, 1 Jac. 284, 23 Rev. Rep. 59.

[76] Hottel v. Mason, 16 Colo. 43, 26 Pac. 335; Beale v. Beale, 116 Ill. 292, 5 N. E. 540, 2 N. E. 65 (1885); McLaughlin v. Barnum, 31 Md. 425; Killefer v. McLain, 78 Mich. 249, 44 N. W. 405; Mayson v. Beazley, 27 Miss. 106; Ogden v. Astor, 4 Sandf. (N. Y.) 311; Ames v. Downing, 1 Bradf. Sur. (N. Y.) 321; Marshall's Estate (Pa.), 34 Pitts. Leg. J. (O. S.) 382.

[77] Blaker v. Morse, 60 Kans. 24, 55 Pac. 274; Joplin v. Cordrey, 9 Ky. L. 445, 5 S. W. 397; Reynaud v. Peytavin, 13 La. 121.

[78] Filley v. Phelps, 18 Conn. 294; Ex parte Clap, Fed. Cas. No. 2783, 2 Lowell 168; Washburn v. Goodman, 17 Pick. (Mass.) 519; Benson v. Ela, 35 N. H. 402; Ex parte Butcher, 13 Ch. Div. 465, 42 L. T. Rep. (N. S.) 299; Brett v. Beckwith, 3 Jur. (N. S.) 31.

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new one, of which the surviving partner is a member, destroys any preference of the creditors of the old firm in such assets.[79] But if the new firm has assumed the debts of the old, the creditors of the old and the new are entitled in most states to share equally in the assets of the new firm.[80] And it has been held that when the survivor has formed a new partnership, which is using the old firm's assets, the creditors of the old firm may have assets of the old which remain in kind appropriated to their debts in preference to debts of the new firm.[81] The rights of the surviving partner in the good-will of the firm and to the firm name have been treated in a former chapter.[82]

§ 643. Accrual of actions.—The Uniform Partnership Act provides, the right to an account of his interest shall accrue to any partner or his legal representative, as against the winding up partners or the surviving partners or the person or partnership continuing the business, at the date of dissolution in the absence of agreement to the contrary.[83]

§ 644. Limitation of actions against surviving partner.—The question of the application of the statute of limitations to a surviving partner's liability to the representatives of a deceased partner, may become an important question. The general rule of law is, that the statute does not run against trust estates in favor of the trustee; according to the English law, the surviving partner is not considered a trustee. In a leading case[84] it was held by Lord Westbury that an action against the surviving partner by the executor of a deceased partner was barred by the statute, upon the grounds that there was no trusteeship. "A source of error," said he, "in this matter is the looseness with which the

[79] McGinty v. Flannagan, 106 U. S. 661, 27 L. ed. 215, 1 Sup. Ct. 380; Fitzpatrick v. Flannagan, 106 U. S. 648, 27 L. ed. 211, 1 Sup. Ct. 369; In re Simpson, L. R. 9 Ch. App. Cas. 572.

[80] Morgan v. Randolph, 73 Conn. 396, 47 Atl. 658, 51 L. R. A. 653; Columbus Watch Co. v. Hodenpyl, 135 N. Y. 430, 32 N. E. 239. See ante §§ 534, 557.

[81] Ex parte Morley, L. R. 8 Ch. 1026.

[82] See ch. 12.

[83] Uniform Partnership Act, § 43.

[84] Knox v. Gye, L. R. 5 H. L. 656.

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word 'trustee' is frequently used. The surviving partner is often called a 'trustee'; but the term is used inaccurately. He is not a trustee, either expressly or by implication. * * * As between the express trustee and the cestui que trust, time will not run; but the surviving partner is not a trustee in that full and proper sense of the word." This view of the case is followed by some American courts,[85] but other American cases have disaffirmed and disapproved the English rule. In a leading case in favor of the theory of trusteeship[86] the court said: "In equity, a surviving partner is treated as a trustee, with the fiduciary relation of trustee and cestui que trustent existing between him and the representatives of the deceased partner. There is a conflict of the authorities upon this point, but in this state (Illinois) the law is as stated." In the same case it is even held that: "In the event of the death of both the partners before the settlement of the partnership affairs, the administrator of the last survivor stands in the shoes of his intestate, and he is charged with the duty of completing the settlement as a trustee, the relation between him and the legal representatives of the partner first deceased being that of trustee and cestui que trustent."[87] It is difficult to see why the latter theory is not the logical and correct one, and the cases holding to the English rule of no trusteeship, show that, as a rule, they admit there is a quasi trusteeship, but refuse to apply the strict rule of trusteeship so as to bar the statute of limitations to these cases. In Georgia, where the bar of the statute is recognized, it has been held that neither the statute nor the equitable bar commences to run in favor of the surviving partner until administration has been taken out on the estate of

[85] Krueger v. Speith, 8 Mont. 482, 20 Pac. 664, 3 L. R. A. 291; Bush v. Clark, 127 Mass. 111; Hogg v. Ashe, 2 N. Car. 471; Mutual Life Ins. Co. v. Sturges, 33 N. J. Eq. 328.

[86] Galbraith v. Tracy, 153 Ill. 54, 38 N. E. 937, 28 L. R. A. 129, 46 Am. St. 867 (1894). See also McPherson v. Swift, 22 S. Dak. 165, 116 N. W. 76; Lindner v. Adams Co. Bank, 49 Nebr. 735, 68 N. W. 1028 (1896).

[87] Citing Dayton v. Bartlett, 38 Ohio St. 357; Thomson v. Thomson, 1 Bradf. Sur. (N. Y.) 24; Brooks v. Brooks, 12 Heisk. (Tenn.) 12; 17 Am. & Eng. Enc. Law, 1158.

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the deceased partner,[88] and it has also been held by an Indiana case[89] that no liability attaches to the surviving partner until a demand for settlement has been made upon him by the representative of the deceased partner, and refused.

[88] Spann v. Fox, 1 Ga. Dec. 1.

[89] Anderson v. Ackerman, 88 Ind. 481.

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CHAPTER XXI

ACCOUNTING, SETTLEMENT AND DISTRIBUTION

SECTION

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§ 650. Dissolution usually necessary to accounting between partners.—Owing to the fact that each partner owes his copartners the duty, among others, of rendering an account of all matters touching the firm, which he possesses, at their request, it follows that a court of equity will enforce this right, should he fail and refuse to render such request. This right is essential to the relation, and is so recognized by the courts. The general rule is, that such suit should only be brought upon dissolution of the firm, and not during its continuance, since espe-

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cially at the time of dissolution is this right of importance, and at that time each partner is entitled to an accounting,[1] and upon dissolution, a settlement and accounting is generally necessary before a distribution of firm assets can be had, and the rights of the several partners ascertained.[2] As said in a leading case:[3] "The general rule is that a court of equity, in a suit by one partner against another, will not interfere in matters of internal regulation, or except with a view to dissolve the partnership and by a final decree to adjust all its affairs.[4] It is not its office 'to enter into a consideration of mere partnership squabbles,'[5] or 'on every occasion to take the management of every play-house and brew-house.'[6] If the members of a firm can not agree as to the method of conducting their business, the courts will not attempt to conduct it for them. Aside from the inconvenience of constant interference, as litigation is apt to breed hard feelings, easy ap-

[1] Rassaert v. Mensch, 17 Cal. App. 637, 120 Pac. 1072; Zimmerman v. Harding, 227 U. S. 489, 57 L. ed. 608, 33 Sup. Ct. 387; Mellor v. Smither, 114 Fed. 116, 52 C. C. A. 64; Hargis v. Campbell, 14 Fla. 27; King v. Courson, 57 Ga. 11; Onstatt v. Ogle, 234 Ill. 454, 84 N. E. 1059; Taylor v. Coffing, 18 Ill. 422; Simonton v. McLain, 37 La. Ann. 663; Bruns v. Spalding, 90 Md. 349, 45 Atl. 194, 47 L. R. A. 614; Malden Bridge v. Salem Turnpike & C. Bridge Corp., 112 Mass. 152; Feige v. Babcock, 111 Mich. 538, 70 N. W. 7; Reis v. Reis, 99 Minn. 446, 109 N. W. 997; Lord v. Hull, 178 N. Y. 9, 70 N. E. 69, 102 Am. St. 484; Kelly v. Kelly, 3 Barb. (N. Y.) 419; Bradly v. Jennings, 201 Pa. 473, 51 Atl. 343.

[2] Chandler v. Wynne, 85 Ala. 301, 4 So. 653; Gleason v. White, 34 Cal. 258; Rassaert v. Mensch, 17 Cal. App. 637, 120 Pac. 1072; Carter v. Bradley, 58 Ill. 101; Derby v. Gage, 38 Ill. 27; Thompson v. Lowe, 111 Ind. 272, 12 N. E. 476; Leonard v. Boyd, 24 Ky. L. 1320, 71 S. W. 508; Reis v. Reis, 99 Minn. 446, 109 N. W. 997; Scott v. Caruth, 50 Mo. 120; Gale v. Sulloway, 62 N. H. 57; Hill v. Beach, 12 N. J. Eq. 31; Sellis Cas, 4 Abb. Pr. (N. Y.) 272; McRae v. McKenzie, 22 N. Car. 232; Lorenz v. Reynolds, 7 Ohio N. P. 17; Singizer's Appeal, 28 Pa. St. 524; Hines v. Dean, 1 White & W. Cir. Cas. Ct. App. (Tex.), § 690; Kilbreth v. Root, 33 W. Va. 600, 11 S. E. 21; Sprout v. Crowley, 30 Wis. 187; Armstrong v. Hollen, 58 Ore. 534, 115 Pac. 423; Ex parte Harper, 1 DeG. & J. 180, 2 Jur. (N. S.) 724.

[3] Lord v. Hull, 178 N. Y. 9, 70 N. E. 69, 102 Am. St. 484.

[4] Citing Story Partnership, § 229; Lindley Partnership, p. 567; Gow Partnership, p. 114; Parsons Partnership, § 206; Bates Partnership, § 910; Collyer Partnership § 236.

[5] Citing Wray v. Hutchinson, 2 Myl. & K. 235, 238.

[6] Citing Carlen v. Drury, 1 Ves. & B. 154, 158.

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peals to the courts to settle the differences of a going concern would tend to do away with mutual forbearance, foment discord and lead to dissolution. It is to the interest of the law of partnership that frequent resort to the courts by copartners should not be encouraged and they should realize that, as a rule, they must settle their own differences or go out of business. As a learned writer has said: 'A partner who is driven to a court of equity as the only means by which he can get an accounting from his copartners, may be supposed to be in a position which will be benefited by a dissolution; in other words, such a partnership as that ought to be dissolved.'[7] 'If the continuance of the partnership is contemplated,' as another commentator has said, 'or if an accounting of only part of the partnership concerns is allowed, no complete justice can be done between the partners, and the fluctuations of a continuing business will render the accounting which is correct to-day, incorrect to-morrow, and to entertain such bills on behalf of a partner would involve the court in incessant litigation, foment disputes, and needlessly drag partners not in fault before the public tribunals.'[8] Judge Story declared that 'a mere fugitive, temporary breach, involving no serious evils or mischief, and not endangering the future success and operations of the partnership, will therefore, not constitute any case for equitable relief. * * * It is very certain that, pending the partnership, courts of equity will not interfere to settle accounts and set right the balance between the partners, but await the regular winding up of the concern.' "[9]

§ 651. **Accounting or action without dissolution.**—"While a forced accounting without a dissolution is not impossible it is by no means a matter of course, for facts must be alleged and proved showing that it is essential to the continuance of the business, or that some special and unusual reason exists to make it necessary. Thus, Mr. Lindley * * * mentions three classes of cases as exceptions to the general rule: (1) Where one part-

[7] Citing Parsons Partnership (4 ed.), § 206.

[8] Citing 2 Bates Partnership, § 910.

[9] Story Partnership, §§ 225, 229.

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ner has sought to withhold from his copartner the profits arising from some secret transaction; (2) where the partnership is for a term of years still unexpired, and one partner has sought to exclude or expel his copartner or drive him to a dissolution; (3) where the partnership has proved a failure, and the partners are too numerous to be made parties to the action and a limited account will result in justice to them all."[10] This second exception probably would not be recognized in those American jurisdictions which hold that a partnership for a fixed term may be dissolved at any time.[11] Under the Uniform Partnership Act, any partner has the right to a formal account as to partnership affairs, (a) if he is wrongfully excluded from the partnership business or possession of its property by his copartners, (b) if the right exists under the terms of any agreement, (c) as provided by section 21, that is for profits derived by a partner from firm transactions without the consent of the other partners, or from any use of firm property by a partner, (d) whenever other circumstances make it just and reasonable.[12] It seems that these provisions do not necessarily imply that dissolution shall accompany accounting. It has been held[13] that, in case there is a clause in the partnership agreement, providing that settlements shall be made during the continuance of the firm, one member of the firm may commence an action for such accounting against his copartner, even though no dissolution of the firm is asked for, and the firm continue operation. This is perhaps not so much of an exception to the general rule, as an acknowledgment of it, and an express provision in the partnership agreement, giving powers by contract which the law does not, of itself, allow. Real exceptions have been recognized, however, in some jurisdictions, as, for instance, if one partner wrongfully attempts to exclude his copartner from the firm,[14] or where one member of the firm is wrongfully withholding from the firm secret profits which he is

[10] Lord v. Hull, 178 N. Y. 9, 70 N. E. 69, 102 Am. St. 484.

[11] See ch. 19, § 576.

[12] Uniform Partnership Act, § 22.

[13] Patterson v. Ware, 10 Ala. 444 (1846).

[14] Richards v. Davies, 2 R. & M. 347 (1831).

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receiving, and to which the firm is entitled.[15] Nor can an action for contribution be maintained by a partner against another until after settlement,[16] with certain exceptions, such as where one partner has agreed to pay the other a sum which was paid out for the firm;[17] or where there is a single item in the accounting unadjusted;[18] or where the adjustment of a matter does not involve an accounting;[19] or upon an agreement for contribution to firm capital;[20] or where a settlement has been agreed on privately.[21] These are all matters which can be separated from partnership affairs in general. The subject of actions between partners will be treated in a subsequent chapter, each of these rights to sue without an accounting being treated specifically.

[15] Sanger v. French, 157 N. Y. 213, 51 N. E. 979 (1898).

[16] De Jarnette v. McQueen, 31 Ala. 230, 68 Am. Dec. 164; Riggs v. Stewart, 2 Cranch C. C. 171, Fed. Cas. No. 11830; Halderman v. Halderman, Fed. Cas. No. 5909, Hempst. (U. S.) 559; Bishop v. Bishop, 54 Conn. 232, 6 Atl. 426; Bracken v. Kennedy, 4 Ill. 558; Crossley v. Taylor, 83 Ind. 337; Warring v. Arthur, 98 Ky. 34, 32 S. W. 221, 17 Ky. L. 605; Theus v. Armistead, 116 La. 795, 41 So. 95; Phillips v. Blatchford, 137 Mass. 510; McGunn v. Hanlin, 29 Mich. 476; Morin v. Martin, 25 Mo. 360; Foss v. Dawes, 72 Nebr. 608, 101 N. W. 237, 102 N. W. 609; Clayton v. Davett (N. J.), 38 Atl. 308 (1897); Gridley v. Dole, 4 N. Y. 486; McDonald v. Holmes, 22 Ore. 212, 29 Pac. 735; Murray v. Herrick, 171 Pa. St. 21, 32 Atl. 1125; Eddins v. Menefee (Ch. App. Tenn.), 54 S. W. 992 (1899); Lockhart v. Lytle, 47 Tex. 452; Compton v. Thorn, 90 Va. 653, 19 S. E. 451; Smith v. Zumbro, 41 W. Va. 623, 24 S. E. 653; Sadler v. Hinxman, 5 B. & Ad. 936.

[17] Lyon v. Malone, 4 Port. (Ala.) 497; Hunt v. Rogers, 7 Allen (Mass.) 469, 83 Am. Dec. 704; Gilmore v. Ham, 133 N. Y. 664, 31 N. E. 624 (affg. 61 Hun 1, 15 N. Y. S. 391, 21 N. Y. Civ. Proc. 102, 39 N. Y. St. 664); Halsted v. Schmelzel, 17 Johns. (N. Y.) 80; Coleman v. Coleman, 12 Rich. (S. Car.) 183; Long v. Garnett, 59 Tex. 229. See post § 746.

[18] Jepsen v. Beck, 78 Cal. 540, 21 Pac. 184; Clarke v. Mills, 36 Kans. 393, 13 Pac. 569; Clouch v. Moyer, 23 Kans. 404; Wheeler v. Arnold, 30 Mich. 304; Brown v. Agnew, 6 Watts & S. (Pa.) 235. See post § 754.

[19] Downs v. Jackson, 33 Ill. 464, 85 Am. Dec. 289; Lambert v. Ingram, 15 B. Mon. (Ky.) 265; Power v. Rees, 189 Pa. St. 496, 42 Atl. 26; Eakin v. Knox, 6 S. Car. 14; Edwards v. Remington, 51 Wis. 336, 8 N. W. 193; Batard v. Hawes, 3 C. & K. 277, 2 El. & Bl. 287; Edger v. Knapp, 1 D. & L. 73, 5 M. & G. 763; Osborne v. Harper, 5 East 225. See post § 745.

[20] Bumpass v. Webb, 1 Stew. (Ala.) 19, 18 Am. Rep. 34; Tyrrell v. Washburn, 6 Allen (Mass.) 466; Sprout v. Crowley, 30 Wis. 187; Brown v. Tapscott, 9 L. J. Exch. 139, 6 M. & W. 119. See post § 749.

[21] Reis v. Reis, 99 Minn. 446, 109 N. W. 997.

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§ 652. Accounting for secret profits.—As was previously seen, a partner has no right to make a secret profit by the use of firm property or by dealings contrary to the duty which he owes the partnership. The observance of the utmost good faith between partners is of the most vital importance, hence one partner may not receive any secret profits in firm transactions, and he may be held to account therefor.[22] So a partner who uses partnership money or property in transactions for himself must account to the firm for the profits thus made.[23] The same rule applies when he engages, for his own benefit, in transactions within the scope of the firm business, and he must account for profits thus made.[24] This rule of accounting for secret profits applies to commissions obtained by a partner on goods sold by the firm;[25]

[22] See ante §§ 389, 391.

[23] Kelley v. Greenleaf, 3 Story (U. S.) 93, Fed. Cas. No. 7657; Warren v. Burnham, 32 Fed. 579; Roberts v. Totten, 13 Ark. 609; Llewelyn v. Levi, 157 Cal. 31, 106 Pac. 219; Painter v. Wilcox, 52 Colo. 639, 125 Pac. 503; Deaner v. O'Hara, 36 Colo. 476, 85 Pac. 1123; Solomon v. Solomon, 2 Ga. 18; Love v. Carpenter, 30 Ind. 284; Levi v. Karrick, 13 Iowa 344; Edelen v. Hagan, 7 S. W. 251, 9 Ky. L. 862; Pomeroy v. Benton, 57 Mo. 531; Brown v. Schackelford, 53 Mo. 122; Dale v. Hogan, 39 Mo. App. 646; Herrick v. Ames, 8 Bosw. (N. Y.) 115; Stoughton v. Lynch, 1 Johns. Ch. (N. Y.) 467; Lay v. Emery, 8 N. Dak. 515, 79 N. W. 1053; Hurst v. Brennen, 239 Pa. 231, 86 Atl. 783, Ann. Cas. 1914 D, 428.

[24] Russell v. Austwick, 1 Sim. 52, 27 Rev. Rep. 157; Burton v. Wookey, 6 Madd. (Eng.) 367; Livingston v. Livingston, 26 Ont. L. 246; Wheeler v. Sage, 1 Wall. (U. S.) 518, 17 L. ed. 646; Gaddie v. Mann, 147 Fed. 960 (revd. on other grounds 158 Fed. 42, 88 C. C. A. 1); Williamson v. Monroe, 101 Fed. 322; Miller v. O'Boyle, 89 Fed. 140; Zimmerman v. Huber, 29 Ala. 379; Boqua v. Marshall, 88 Ark. 373, 114 S. W. 714; Grafton v. Paine, 7 App. Cas. (D. C.) 255; Kilbourn v. Latta, 5 Mackey (D. C.) 304, 60 Am. Rep. 373; Wiggins v. Markham, 131 Iowa 102, 108 N. W. 113; Anderson v. Whitlock, 2 Bush (Ky.) 398, 92 Am. Dec. 489; White v. Jouett, 147 Ky. 197, 144 S. W. 55; Todd v. Rafferty, 30 N. J. Eq. 254; Weston v. Ketcham, 39 Super. Ct. (N. Y.) 54; Bast's Appeal, 70 Pa. St. 301; Edwards v. Johnson, 90 S. Car. 90, 72 S. E. 638; Henson v. Byrne (Tex.), 41 S. W. 494; Burns v. Russell (Tex.), 146 S. W. 707; Yost v. Critcher, 112 Va. 870, 72 S. E. 594; Miller v. Ferguson, 110 Va. 217, 65 S. E. 562, 28 L. R. A. (N. S.) 618n, 135 Am. St. 934; McMahon v. McClernan, 10 W. Va. 419.

[25] Fawcett v. Whitehouse, 1 Russ. & M. 132; Pratt v. Frazer, 95 Ark. 405, 129 S. W. 1088; Manufacturers' Nat. Bank v. Cox, 2 Hun (N. Y.) 572, 5 Thomp. & C. 126 (affd. 59 N. Y. 659).

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or purchases made by him for the firm;[26] or purchasing firm property in an individual name;[27] or renewing in his own name an agency held by the firm;[28] or becoming interested in a business which controls the sale of the product of a mine owned by the firm.[29] By the Uniform Partnership Act, "every partner must account to the partnership for any benefit, and hold as trustee for it any profits derived by him without the consent of the other partners from any transaction connected with the formation, conduct, or liquidation of the partnership or from any use by him of its property."[30]

§ 653. **Particular cases on secret profits.**—In one case,[31] which was an action between partners for dissolution and accounting, the facts were as follows: One partner, previous to the formation of the firm, had purchased a stallion for the sum of twelve hundred dollars, which fact was unknown to several of his copartners. After the formation of the partnership he was designated by his copartners to purchase a stallion. He reported to them that he had purchased the said stallion for the firm for eighteen hundred dollars, and showed them a receipt from the party from whom he had purchased the stallion, for eighteen hundred dollars. Thereupon the partnership paid him the full eighteen hundred dollars, but later it was discovered that he had paid but the twelve hundred dollars for the stallion. A dissolution and accounting were asked for, and the indebtedness of the purchasing partner of six hundred dollars was set up. The court allowed the petition, and said: "If Lofgren (the purchasing partner) had previously purchased the horse at twelve hundred dollars,—and it was admitted that he had,—he fraudulently im-

[26] Bentley v. Craven, 18 Beav. (Eng.) 75; Farrar v. Kingsley, 126 N. Y. S. 584; Dunlop v. Richards, 2 E. D. Smith (N. Y.) 181.

[27] Gunn v. Black, 60 Fed. 151, 19 U. S. App. 477, 8 C. C. A. 534; Vetter v. Lentzinger, 31 Iowa 182; Deavenport v. Green River Deposit Bank, 138 Ky. 352, 128 S. W. 88; Jones v. Dexter, 130 Mass. 380, 39 Am. Rep. 459.

[28] Holmes v. Darling, 213 Mass. 303, 100 N. E. 611.

[29] Hurst v. Brennen, 239 Pa. 216, 86 Atl. 778, Ann. Cas. 1914 D, 428.

[30] Uniform Partnership Act, § 21.

[31] Bloom v. Lofgren, 64 Minn. 1, 65 N. W. 960 (1896).

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posed upon those with whom he was dealing, his actual or proposed copartners in the transaction. * * * In their dealings with each other, partners occupy positions of trust, and are required to exercise the most scrupulous good faith toward each other. Nor is this requirement confined to persons who are actually copartners, but it extends to those negotiating for a partnership not yet formed." It is well settled, that in order for the right of accounting to exist against a partner, aside from a universal partnership, or of express agreement, for secret profits, the profits must be upon such transactions as come within the scope of the partnership business, and in competition with the partnership. In a leading case[32] the court said upon this question: "It is well settled that a partner may traffic outside of the scope of the firm's business for his own benefit and advantage, and without going into the authorities it is sufficient to cite the thoroughly considered case of Aas v. Benham,[33] in which it was sought to make one partner accountable for profits realized from another business, on the ground that he availed himself of information obtained by him in the course of his partnership business, or by reason of his connection with the firm, to secure individual advantage in the new enterprise. It was there laid down by Lord Justice Lindley that if a member of a partnership firm avails himself of information obtained by him in the course of the transaction of the partnership business, or by reason of his connection with the firm, for any purpose within the scope of the partnership business, or for any purpose which would compete with the partnership business, he is liable to account to the firm for any benefit he may have obtained from the use of such information; but if he uses the information for purposes which are wholly without the scope of the partnership business, and not competing with it, the firm is not entitled to an account of such benefits. It was further laid down in that case in explanation of what was said by Lord Justice Cotton in Dean v. Macdowell,[34] that "it is not the

[32] Latta v. Kilbourn, 150 U. S. 524, 37 L. ed. 1169, 14 Sup. Ct. 201 (1893).

[33] (1891), 2 Ch. 244, 255.

[34] Dean v. MacDowell, L. R. 8 Ch. Div. 345.

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source of the information, but the use to which it is applied, which is important in such matters. To hold that a partner can never derive any personal benefits from information which he obtains as a partner, would be manifestly absurd." And it was said by Lord Justice Bowen that, "the character of information acquired from the partnership transaction, or from connection with the firm, which the partner might not use for his private advantage, is such information as belongs to the partnership in the sense of property which is valuable to the partnership, and in which it has a vested right." It was said in another case:[35] "In the absence of an express stipulation to the contrary, the parties to a contract of copartnership always understand, from the very nature of the relation, that all gains made by either in the prosecution of the common business, shall be joint property. Generally, a copartnership is a combination of the capital, skill, industry and influence of two or more persons for the prosecution of a particular business for their mutual benefit, and a claim by one that he has a right to carry on a part of the joint business for his own advantage and to the manifest injury of his associates, is so utterly destructive of the rights and duties legally incident to the relation, that it will never be sanctioned by a court until it is clearly shown that he holds such right by the assent of his associates. It is certain that the existence of such right should not be inferred from slight circumstances, and that is all there is to support it in this case. I consider the fact clearly established, that Mr. Rafferty carried on, clandestinely, a part of the business which he and the complainant had associated themselves together to prosecute for their joint benefit, and, consequently, I deem it to be entirely beyond dispute that the complainant is entitled to an account of such business, and to be awarded a share of its profits, unless some other sufficient defense has been shown."

§ 654. Profits from independent transactions.—A partner may be compelled to account for transactions carried on in com-

[35] Todd v. Rafferty, 30 N. J. Eq. 254.

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petition with the firm business[36] but not, as a general rule, for transactions carried on independently which are not within the scope of the partnership business, even though information gained in the partnership affairs is utilized in such business.[37] If the partnership agreement provides that the members shall give their entire attention to the business, a partner may be liable to account for profits made in outside ventures, on the theory of using time which is the firm's,[38] or may be held liable in damages.[39] But this rule does not apply where there is no specific agreement by a partner to devote his entire time to the firm, and where he has not neglected firm business in carrying on his outside ventures.[40] There is no duty to account for profits made in outside business after dissolution of the firm.[41]

§ 655. Accounting where partnership is illegal.—As a general rule, courts will not compel one partner to account to another where the partnership is illegal or for illegal transactions carried on by a partnership.[42] This rule has been applied where the purpose of the business was to prevent competition in bidding on

[36] Manufacturers' Nat. Bank v. Cox, 2 Hun (N. Y.) 572 (affd. without opinion in 59 N. Y. 659); Grafton v. Paine, 7 App. D. C. 255 (appeal dismissed in 168 U. S. 704, 42 L. ed. 1212, 18 Sup. Ct. 942); Williamson v. Monroe, 101 Fed. 322.

[37] Shrader v. Downing, 79 Wash. 476, 140 Pac. 558, 52 L. R. A. (N. S.) 389n; Latta v. Kilbourn, 150 U. S. 524, 37 L. ed. 1169, 14 Sup. Ct. 201 (revg. 5 Mackey 304, 60 Am. Rep. 373); Dennis v. Gordon, 163 Cal. 427, 125 Pac. 1063; Parnell v. Robinson, 58 Ga. 26; Metcalfe v. Bradshaw, 145 Ill. 124, 33 N. E. 1116, 36 Am. St. 478; Martin v. Stout (Iowa), 127 N. W. 49; Aas v. Benham [1891], 2 Ch. 244, 65 L. T. N. S. 25, 19 Eng. Rul. Cas. 582; Dean v. MacDowell, L. R. 8 Ch. Div. 345, 38 L. T. N. S. 862, 47 L. J. Ch. N. S. 537, 26 Wkly. Rep. 486.

[38] Moritz v. Peebles, 4 E. D. Smith (N. Y.), 135.

[39] Winchester v. Glazier, 152 Mass. 316, 25 N. E. 728, 9 L. R. A. 424; Lessig v. Langton, Brightly (N. P.) (Pa.) 191.

[40] Starr v. Case, 59 Iowa 491, 13 N. W. 645; Dennis v. Gordon, 163 Cal. 427, 125 Pac. 1063; Murrell v. Murrell, 33 La. Ann. 1233.

[41] Cane v. Macdonald, 23 Can. Law Times Occ. N. 32, 9 B. C. 297; Waring v. Cram, 1 Pars. Sel. Eq. Cas. 516, 12 Mor. Min. Rep. 280.

[42] Fryer v. Harker, 142 Iowa 708, 121 N. W. 526, 23 L. R. A. (N. S.) 477; McMullen v. Hoffman, 174 U. S. 639, 43 L. ed. 1117, 19 Sup. Ct. 839; Wheeler v. Sage, 1 Wall. (U. S.) 518, 17 L. ed. 646; Bartle v. Nutt, 4 Pet. (U. S.) 184, 7 L. ed. 825; Boyd v. Barclay, 1 Ala. 34, 34 Am. Dec.

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public contracts;[43] to carry on a lottery business;[44] letting furnished apartments for the purposes of prostitution;[45] operating a faro bank;[46] highway robbery;[47] sharing in profits made in dealing with a corporation of which the partners are officers, whether the corporation be private,[48] or governmental;[49] or where one partner was a government official, and the partnership scheme was to defraud the government through a contract made by such official;[50] or where the business was the illegal manufacture of spirituous liquors.[51] Sometimes, however, an accounting has been allowed where the illegal transaction has been completed and the profits have been turned over to the defendant partner[52] or have

762; Chateau v. Singla, 114 Cal. 91, 45 Pac. 1015, 33 L. R. A. 750, 55 Am. St. 63; Shaffner v. Pinchback, 133 Ill. 410, 24 N. E. 867, 23 Am. St. 624; Northrup v. Phillips, 99 Ill. 449; Craft v. McConoughy, 79 Ill. 346, 22 Am. Rep. 171; Skeels v. Phillips, 54 Ill. 309; Miller v. Davidson, 3 Gil. (Ill.) 518, 44 Am. Dec. 715; Hunter v. Pfeiffer, 108 Ind. 197, 9 N. E. 124; Anderson v. Powell, 44 Iowa 20; Central Trust Co. v. Respass, 112 Ky. 606, 66 S. W. 421, 56 L. R. A. 479, 99 Am. St. 317; Barrow v. Pike, 21 La. Ann. 14; Spies v. Rosenstock, 87 Md. 14, 39 Atl. 268; Dunham v. Presby, 120 Mass. 285; Sampson v. Shaw, 101 Mass. 145, 3 Am. Rep. 327; Durant v. Rhener, 26 Minn. 362, 4 N. W. 610; Jackson v. McLean, 100 Mo. 130. 13 S. W. 393; Green v. Corrigan, 87 Mo. 359; Morrison v. Bennett, 20 Mont. 560, 52 Pac. 553, 40 L. R. A. 158; Todd v. Rafferty, 30 N. J. Eq. 254; Kelly v. Devlin, 58 How. Pr. (N. Y.) 487 (affd. 47 N. Y. Super. Ct. 555); Wiggins v. Bisso, 92 Tex. 219, 47 S. W. 637, 71 Am. St. 837; Read v. Smith, 60 Tex. 379; Lane v. Thomas, 37 Tex. 157; Gordon v. Howden, 12 Cl. & F. 237; Armstrong v. Lewis, 4 Moo. & S. 1, 30 E. C. L. 539; Sykes v. Beadon, 11 Ch. Div. 170; Tench v. Roberts, 6 Madd. 145. See also Wheeler v. Sage, 1 Wall. (U. S.) 518, 17 L. ed. 646.

[43] McMullen v. Hoffman, 174 U. S. 639, 43 L. ed. 1117, 19 Sup. Ct. 839; Hunter v. Pfeiffer, 108 Ind. 197, 9 N. E. 124; King v. Winants, 71 N. Car. 469, 17 Am. Rep. 11.

[44] Watson v. Murray, 23 N. J. Eq. 257.

[45] Chateau v. Singla, 114 Cal. 91, 45 Pac. 1015, 33 L. R. A. 750, 55 Am. St. 63.

[46] Watson v. Fletcher, 7 Grat. (Va.) 1.

[47] Everet v. Williams, 9 Law Quart. Rev. 197.

[48] Cook v. Sherman, 20 Fed. 167, 4 McCrary (U. S.) 20; Jackson v. McLean, 100 Mo. 130, 13 S. W. 393.

[49] Collins v. Swindle, 6 Grant Ch. (U. C.) 282.

[50] Bartle v. Nutt, 4 Pet. 184, 7 L. ed. 825.

[51] Vandegrift v. Vandegrift, 226 Pa. 254, 75 Atl. 365, 18 Ann. Cas. 404.

[52] Sharp v. Taylor, 2 Phil. (Eng.) 801; Planters Bank v. Union Bank, 16 Wall. (U. S.) 483, 21 L. ed. 473; McBlair v. Gibbes, 17 How. (U. S.) 232, 15 L. ed. 132; Cook v. Sher-

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been reinvested.[53] It is said that a recovery can not be had where the party seeking it must show the illegal transaction in order to make out his case, but when the advances have been made on a new contract, remotely connected with the original illegal transaction, and the right of recovery does not depend upon the illegal contract but may be proved without reference to it, then a recovery may be allowed.[54]

§ 656. Some leading cases on accounting where partnership is illegal.—In the leading case of Brooks v. Martin, in which an accounting was allowed, soldiers claims for land warrants had been purchased in violation of statute by a firm with money furnished by one partner, the court said:[55] "When the bill in the present case was filed, all the claims of soldiers thus illegally purchased by the partnership, with money advanced by complainant, had been converted into land warrants, and all the warrants had been sold or located. The original defect in the purchase had, in many cases, been cured by the assignment of the warrant by the soldier after its issue. A large proportion of the

man, 20 Fed. 167, 4 McCrary (U. S.) 20; Burke v. Flood, 1 Fed. 541, 6 Sawy. 220; Crescent Ins. Co. v. Bear, 23 Fla. 50, 1 So. 318, 11 Am. St. 331; Fryer v. Harker, 142 Iowa 708, 121 N. W. 526, 23 L. R. A. (N. S.) 477; Harvey v. Varney, 98 Mass. 118; Howe v. Jolly, 68 Miss. 323, 8 So. 513; Pfeuffer v. Maltby, 54 Tex. 454, 38 Am. Rep. 631; DeLeon v. Trevino, 49 Tex. 88, 30 Am. Rep. 101; McDonald v. Lund, 13 Wash. 412, 43 Pac. 348. See also Crescent Ins. Co. v. Baer, 23 Fla. 50, 1 So. 318, 11 Am. St. 331. Compare Craft v. McConoughty, 79 Ill. 346, 22 Am. Rep. 171.

[53] Brooks v. Martin, 2 Wall. (U. S.) 70, 17 L. ed. 732; Dent v. Ferguson, 132 U. S. 50, 10 Sup. Ct. 13, 33 L. ed. 242; Morris Run Coal Co. v. Barclay Coal Co., 68 Pa. 173, 8 Am. Rep. 159; Lestapies v. Ingraham, 5 Pa. St. 71; Wiggins v. Bisso. 92 Tex. 219, 47 S. W. 637, 71 Am. St. 837; Floyd v. Patterson, 72 Tex. 202, 10 S. W. 526, 13 Am. St. 787 (affd. 18 S. W. 654); De Leon v. Trevino, 49 Tex. 88, 30 Am. Rep. 101; Boggess v. Lilly, 18 Tex. 200; Wells v. McGeoch, 71 Wis. 196, 35 N. W. 769. See also Armstrong v. Toler, 11 Wheat. (U. S.) 258, 6 L. ed. 468.

[54] Vandegrift v. Vandegrift, 226 Pa. 254, 75 Atl. 365, 18 Ann. Cas. 404; quoting Story Agency, § 347, note. See also Cook v. Sherman, 20 Fed. 167, 4 McCrary (U. S.) 20; Sharp v. Taylor, 2 Phil. Ch. 801.

[55] Brooks v. Martin, 2 Wall. (U. S.) 70, 17 L. ed. 732.

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lands so located had also been sold, and the money paid for some of it, and notes and mortgages given for the remainder. There were then in the hands of defendant lands, money, notes and mortgages, the results of the partnership business, the original capital for which plaintiff had advanced. It is to have an account of these funds, and a division of these proceeds, that this bill is filed. Does it lie in the mouth of the partner who has, by fraudulent means, obtained possession and control of all these funds, to refuse to do equity to his other partners, because of the wrong originally done or intended to the soldier? It is difficult to perceive how the statute, enacted for the benefit of the soldier, is to be rendered any more effective by leaving all this in the hands of Brooks, instead of requiring him to execute justice as between himself and his partner; or what rule of public morals will be weakened by compelling him to do so? The title to the lands is not rendered void by the statute. It interposes no obstacle to the collection of the notes and mortgages. The transactions which were illegal have become accomplished facts, and can not be affected by any action of the court in this case." But many cases refuse to allow an accounting of the affairs of illegal partnerships merely because the transaction is at an end and one partner holds the funds.[56] In a leading case the parties had entered into a secret agreement not to compete with each other in bidding on public contracts, and had a written agreement to share in the profits of certain bids secured by them, on suit by one partner for an accounting, the other defended by setting up that the agreement to share profits was a portion of the entire illegal agreement. The court said:[57] "In the case at bar, the action depends upon the entire contract between the parties, part of which we hold was

[56] McMullen v. Hoffman, 174 U. S. 639, 19 Sup. Ct. 839, 43 L. ed 1117; Central Trust &c. Co. v. Respass, 112 Ky. 606, 66 S. W. 421, 56 L. R. A. 479, 99 Am. St. 317; Dunham v. Presby, 120 Mass. 285; Morrison v. Bennett, 20 Mont. 560, 52 Pac. 553, 40 L. R. A. 158; Todd v. Rafferty, 30 N. J. Eq. 254; King v. Winants, 71 N. Car. 469, 17 Ann. Rep. 11; Sykes v. Beadon, L. R. 11 Ch. Div. 170.

[57] McMullen v. Hoffman, 174 U. S. 639, 19 Sup. Ct. 839, 43 L. ed. 1117.

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illegal. The partnership part of the agreement can not be separated from the rest. The complainant's claim to profits rests upon the entire contract; his right is based upon that which is illegal and utterly void, and he can not separate his cause of action from the illegal part and claim a recovery upon the written portion providing for and evidencing the partnership. * * * We must therefore come back to the proposition that to permit a recovery in this case is in substance to enforce an illegal contract and one which is illegal because it is against public policy to permit it to stand. The court refuses to enforce such a contract, and it permits defendant to set up its illegality, not out of any regard for the defendant who sets it up, but only on account of the public interest. It has been often stated in similar cases that the defense is a very dishonest one, and it lies ill in the mouth of the defendant to allege it, and it is only allowed for public considerations and in order the better to secure the public against dishonest transactions. To refuse to grant either party to an illegal contract judicial aid for the enforcement of his alleged rights under it tends strongly toward reducing the number of such transactions to a minimum. The more plainly parties understand that when they enter into contracts of this nature they place themselves outside the protection of the law, so far as that protection consists in aiding them to enforce such contracts, the less inclined will they be to enter into them. In that way the public secures the benefit of a rigid adherence to the law." The court distinguishes Brooks v. Martin,[58] saying: "There is a difference between the case before us and that of Brooks v. Martin, because in the latter case the fact existed that the transactions in regard to which the cause of action was based, were not fraudulent, and they related in some sense to private matters, while in the case before the court, the entire contract was a fraud and was illegal, and related to a public letting by a municipal corporation for work involving a large amount of money, and in which the whole municipality was vitally interested. It may be difficult to base

[58] 2 Wall. (U. S.) 70, 17 L. ed. 732.

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a distinction of principle upon these differences. We do not now decide whether they exist or not. We simply say that taking that case into due and fair consideration, we will not extend its authority at all beyond the facts therein stated." In another case, after a review of authorities, it was said:[59] "But in these cases, as well as in other cases which are therein cited and reviewed, the partnership was in no instance formed and conducted for a traffic which the law made a crime and a nuisance. The distinction between enforcing the execution of an agreement to do an illegal act, and the distribution of the realized profits of the act, made use of in those cases to do justice between the parties, is obviously not to be regarded as one of universal or general application. It would seem needless to say that it can not be invoked to apportion among criminals the gains resulting from their crimes. No case has been referred to, and none, I am sure, can be found, where the illegal act has been also a misdemeanor, punishable by fine and imprisonment for the protection of the public safety and morals. Where such is the fact, the distinction is excluded by manifest considerations of example and influence; considerations not deemed to exist in the cases where the distinction was allowed." Where part only of the business is illegal and part is legal, an accounting has sometimes been allowed as to the part which is legal.[60] If the partnership is legal, and the partner who asks the accounting is innocent, the defendant can not escape accounting by setting up that the profits were made by his illegal acts.[61]

[59] Watson v. Murray, 23 N. J. Eq. 257.

[60] Bennett v. Woolfolk, 15 Ga. 213; Fryer v. Harker, 142 Iowa 708, 121 N. W. 526, 23 L. R. A. (N. S.) 477; Anderson v. Powell, 44 Iowa 20; Central Trust &c. Co. v. Respass, 112 Ky. 606, 66 S. W. 42, 56 L. R. A. 479, 99 Am. St. 317; Wishek v. Hammond, 10 N. Dak. 72, 84 N. W. 587.

[61] Thwaites v. Coulthwaite (1896), 1 Ch. 496; Van Tine v. Hilands, 131 Fed. 124; Shriver v. McCloud, 20 Nebr. 474, 30 N. W. 534; Pennington v. Todd, 47 N. J. Eq. 569, 21 Atl. 297, 11 L. R. A. 589, 24 Am. St. 419; Jones v. Davidson, 2 Sneed (Tenn.) 447; Corralitos Co. v. Mackey, 31 Tex. Civ. App. 316, 72 S. W. 624. See also Harvey v. Varney, 98 Mass. 118.

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§ 657. Who may require accounting.—Every partner has the right to require an accounting upon dissolution.[62] Both a silent partner,[63] and the assignee or purchaser of a partner's share,[64] or of a share in the interests of each partner,[65] have such right to accounting after dissolution. A corporation which is a member of a partnership, is held entitled to an accounting.[66] Where the partnership agreement provided that the partnership should expire at a fixed date, but the business was permitted to continue longer, until the formation of a new firm from which one of the old partners was omitted, such partner has a right to an accounting from the members of the new firm.[67] Generally the right is denied to individual creditors of a partner,[68] although an individual creditor who has levied execution on the partner's interest in the firm has been allowed by some decisions the right to an accounting in order to ascertain the extent of such interest.[69] Personal representatives of the deceased partner may have an accounting from the surviving partner.[70] Generally, however,

[62] See cases cited in ante § 650, note 1.

[63] Harvey v. Varney, 98 Mass. 118; Maddock v. Steel, 68 Hun 522, 23 N. Y. S. 61, 52 N. Y. St. 754; Parsons v. Hayward, 4 DeG., F & J. 474, 8 Jur. (N. S.) 924; Brigham v. Smith, 3 Grant. Err. & App. (U. C.) 46.

[64] Fountaine v. Urquhart, 33 Ga. Supp. 184; Mathewson v. Clarke, 6 How. (U. S.) 122, 12 L. ed. 370; Pendleton v. Wambersie, 4 Cranch. (U. S.) 73, 2 L. ed. 554; Hacker v. Johnson, 66 Maine 21; Bruns v. Spalding, 90 Md. 349, 45 Atl. 194; Stokes v. Stokes, 59 Hun 431, 13 N. Y. S. 407, 36 N. Y. St. 620 (affd. 128 N. Y. 615, 28 N. E. 253); Eilers Music House v. Reine, 65 Ore. 598, 133 Pac. 788; Marx v. Goodnough, 23 Ore. 545, 32 Pac. 511; Knight v. Ogden, 2 Tenn. Ch. 473; Watts v. Driscoll [1901], 1 Ch. 294, 70 L. J. Ch. 157.

[65] Lovejoy v. Bailey, 214 Mass. 134, 101 N. E. 63.

[66] Doubleday, Page &c. Co. v. Shumaker, 113 N. Y. S. 83.

[67] Near v. Lowe, 49 Mich. 482, 13 N. W. 825.

[68] Milleman v. Kavanaugh, 213 Pa. 240, 62 Atl. 907.

[69] Nixon v. Nash, 12 Ohio St. 647, 80 Am. Dec. 390.

[70] Secor v. Tradesmen's Nat. Bank, 92 App. Div. 294, 87 N. Y. S. 181; Peck v. Knapp, 137 N. Y. S. 70; Cheeseman v. Wiggins, 1 Thomps. & C. (N. Y.) 595; Robertson v. Burrell, 110 Cal. 568, 42 Pac. 1086 (applying code Civ. Proc. § 1585); Andrews v. Stinson, 254 Ill. 111, 98 N. E. 222; Winslow v. Leland, 128 Ill. 304, 21 N. E. 588; Devine v. Cotunio, 187 Ill. App. 414; Brown v. Brown, 175 Mich. 442, 141 N. W. 553; Pitt v. Moore, 99 N. Car. 85, 5 S. E. 389, 6 Am. St. 489; McPherson v. Swift,

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the right of the heirs is to proceed against the personal representative and not against the surviving partner.[71] But the heirs or creditors, if the surviving partners act as executors or administrators of the deceased partner, may be granted the right to an accounting.[72] And where the executor or administrator refuses to bring the action,[73] or in the existence of other special circumstances such as collusion between the personal representative and surviving partner.[74] A partner may by agreement or by conduct, waive his right to an accounting.[75]

§ 658. Who must account.—Every partner after dissolution is under a duty to account to copartners for his acts and dealings as partner.[76] Surviving partners after dissolution are under the duty to account to the personal representatives of a deceased

22 S. Dak. 165, 116 N. W. 76; Newell v. Humphrey, 37 Vt. 265; Clegg v. Fishwick, 1 Hall & T. 390, 47 Eng. Reprint 1463; Taylor v. Taylor, 28 L. T. Rep. (N. S.) 188.

[71] Mason v. Hicks, 76 Vt. 287, 56 Atl. 1011; Dent v. Slough, 40 Ala. 518; Rosenzweig v. Thompson, 66 Md. 593, 8 Atl. 659; Harrison v. Righter, 11 N. J. Eq. 389; Edgar v. Baca, 1 N. Mex. 613; Boggs v. Bird, 131 N. Y. 665, 30 N. E. 868 (affg. 14 N. Y. S. 344, 60 Hun 579, 38 N. Y. St. 992); Hyer v. Burdett, 1 Edw. Ch. (N. Y.) 325.

[72] Beningfield v. Baxter, 12 App. Cas. 167, 56 L. J. P. C. 13, 56 L. T. Rep. (N. S.) 127; Travis v. Milne, 9 Hare 141, 20 L. J. Ch. 665; Cropper v. Knapman, 6 L. J. Exch. 9, 2 Y. & C. Exch. 338; Bowsher v. Watkins, 1 Russ. & M. 277; Hyer v. Burdett, 1 Edw. Ch. (N. Y.) 325.

[73] Fleischmann v. Fleischmann, 66 N. Y. S. 631; Byers v. Weeks, 105 Mo. App. 72, 79 S. W. 485.

[74] Conrad v. Fuller, 98 Va. 16, 34 S. E. 893.

[75] Wagner v. Wagner, 50 Cal. 76; Grashell v. Knoll, 16 S. W. 453, 13 Ky. L. 241; Thompson v. Noble, 108 Mich. 19, 65 N. W. 563; Bassett v. Henry, 34 Mo. App. 548; Moffat v. Moffat, 10 Bosw. (N. Y.) 468, 17 Abb. Pr. 4; Buford v. Neely, 17 N. Car. 481; Bradly v. Jennings, 201 Pa. 473, 51 Atl. 343; McPherson v. Swift, 22 S. Dak. 165, 116 N. W. 76.

[76] Rosenstiel v. Gray, 112 Ill. 282; Taylor v. Wells, 113 Iowa 326, 85 N. W. 30; Peterson v. Poignard, 6 B. Mon. (Ky.) 570; Feige v. Babcock, 111 Mich. 538, 70 N. W. 7; Ruckman v. Decker, 23 N. J. Eq. 283 (revd. on other grounds in 28 N. J. Eq. 614); Walford v. Harris, 78 Hun 341, 29 N. Y. S. 123, 59 N. Y. St. 527; Wilson v. Keller, 195 Pa. St. 98, 45 Atl. 682; O'Meara v. Ouellet, 28 Quebec Super. Ct. 418; Eng. Partnership Act (1890), § 29. See McGinniss v. Fink, 198 Pa. 404, 48 Atl. 267.

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partner,[77] but the partnership agreement may relieve them from such duty.[78] Nor can a personal representative of the deceased escape the duty of accounting, where his decedent or himself was in management or control of firm assets.[79] The mere surety of a deceased partner is not liable to an accounting.[80] Fraudulent transferees of partnership effects who took part in the fraud, may be compelled to account.[81]

§ 659. What property must be accounted for.—All the firm property, of whatever nature or kind, should be included in the final accounting and settlement.[82] This does not include former firm property which has been transferred to a partner, or third persons,[83] property held by partners as joint owners,[84] or

[77] Fried v. Burk, 125 Md. 500, 94 Atl. 86; Chapin v. Chapin (Mass.), 36 N. E. 746 (1894); Ogden v. Astor, 4 Sandf. (N. Y.) 311; Hutchinson v. Campbell, 13 Misc. 152, 34 N. Y. S. 82, 68 N. Y. St. 74; Taylor v. Taylor, 28 L. T. Rep. (N. S.) 188.

[78] Vyse v. Foster, L. R. 7 H. L. 318, 44 L. J. Ch. 37.

[79] Marlatt v. Scantland, 19 Ark. 443; Hargis v. Campbell, 14 Fla. 27; Flynn v. Seale, 2 Cal. App. 665, 84 Pac. 263; Raison v. Williams, 19 Ky. L. 1142, 42 S. W. 1108; Wilby v. Phinney, 15 Mass. 116; Gaskill v. Adams, 83 Mo. App. 380; Kline v. Kline, 3 Ch. Chamb. (U. C.) 137. See Dariano v. Fidalgo, 14 Philippine 62 (dictum).

[80] Bissell v. Ames, 17 Conn. 121.

[81] Lovejoy v. Bailey, 214 Mass. 134, 101 N. E. 63.

[82] Russell v. Green, 10 Conn. 269; Swafford v. White, 89 S. W. 129, 28 Ky. L. 119; Klotz v. Macready, 39 La. Ann. 638, 2 So. 203; Wiggins v. Brand, 202 Mass. 141, 88 N. E. 840; Gay v. Ray, 195 Mass. 8, 80 N. E. 693; Killefer v. McLain, 70 Mich. 508, 38 N. W. 455; Arthur v. Sire, 105 App. Div. 454, 94 N. Y. S. 346 (mod. 45 Misc. 257, 92 N. Y. S. 158); Church v. Adams, 37 Ore. 355, 61 Pac. 639; Plumly v. Plumly, 6 Pa. Co. Ct. 72; Washburn v. Washburn, 23 Vt. 576; Moore v. Wheeler, 10 W. Va. 35; Aldecoa v. Warner, 16 Philippine 423. See Bushby v. Berkeley, 153 App. Div. 742, 138 N. Y. S. 831; Consaul v. Cummings, 30 App. (D. C.) 540; Whitney v. Whitney, 27 Ky. L. 1197, 88 S. W. 311; Morrill v. Weeks, 70 N. H. 178, 46 Atl. 32.

[83] Rushing v. Peoples, 42 Ark. 390; Price v. Hicks, 14 Fla. 565; Rhoton's Succession, 34 La. Ann. 893; Blakeley v. LeDuc, 22 Minn. 476; Burress v. Blair, 61 Mo. 133; Tygart v. Wilson, 39 App. Div. 58, 56 N. Y. S. 827; Fellerman v. Goldberg, 28 Misc. 235, 58 N. Y. S. 1113; Browne v. Scull, 27 Pa. Super. Ct. 513; Betts v. Letcher, 1 S. Dak. 182, 46 N. W. 193. Compare Gresham v. Harcourt (Tex. Civ. App.), 50 S. W. 1058.

[84] Gordon v. Gordon, 49 Mich. 501, 13 N. W. 834; Jones v. Jones, 23 Ark. 212; Crocker v. Barteau, 212 Mo. 359, 110 S. W. 1062.

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property which never belonged to the firm.[85] Partnership real estate is included, as well as personal property.[86] Where the same persons engaged in two separate partnerships under different agreements, so that the one was not a continuation of the other, a settlement as to the second partnership should not take into account contributions to the capital of the first, unless it is so provided or agreed.[87] A surviving or liquidating partner is usually held accountable for the fair value of firm assets at the time of dissolution.[88] "In stating partnership accounts, where one partner has had entire charge of the business, he is to be debited with the whole capital placed in his hands, as well as with the proceeds of sales realized by him. If part of the capital consisted of stock, which has been used in the business, or disposed of and the proceeds charged against him, he should be credited with such stock as a disbursement, to the amount at which it was originally charged against him."[89] Debts and expenditures on behalf of the firm should also be included in the account.[90] Bad debts may be stricken off, if not the result of the negligence of the partner who is accounting,[91] and worthless assets may be appraised as valueless.[92] Ordinarily in this country courts will not order a return of a premium paid for admission

[85] Waisner v. Waisner, 15 Wyo. 420, 89 Pac. 580, 123 Am. St. 1081. See Moore v. Rawson, 199 Mass. 493, 85 N. E. 586.

[86] Godfrey v. White, 43 Mich. 171, 5 N. W. 243; Burkardt v. Walsh, 64 N. Y. S. 779. Compare Comstock v. McDonald, 136 Mich. 489, 101 N. W. 55.

[87] Nicholson v. Kinsey (Tenn.), 38 S. W. 1033.

[88] Gunnell v. Bird, 10 Wall. (U. S.) 304, 19 L. ed. 913; Cheeseman v. Wiggins, 1 Thomps. & C. (N. Y.) 595; Parker v. Broodbent, 134 Pa. St. 322, 19 Atl. 631; Kinloch v. Hamlin, 2 Hill. Eq. (S. Car.) 19, 27 Am. Dec. 441; Morris v. Owen (Tex. Civ. App.), 143 S. W. 227; King v. White, 63 Vt. 158, 21 Atl. 535, 25 Am. St. 752; Simmons v. Leonard, 3 Hare 581, 25 Eng. Ch. 581. See Taylor v. Hutchinson, 25 Grat. (Va.) 536, 18 Am. Rep. 699; Frierson v. Morrow (Tenn. Ch. App.), 48 S. W. 245.

[89] Gunnell v. Bird, 10 Wall. (U. S.) 304, 19 L. ed. 913.

[90] Chambers v. Crook, 42 Ala. 171, 94 Am. Dec. 637; Lusk v. Graham, 21 La. Ann. 159; Stitzel v. Ehrman (Ky.), 114 S. W. 280; Ridgway v. Clare, 19 Beav. 111, 52 Eng. Reprint 291. See Gorman v. Madden, 27 S. Dak. 319, 131 N. W. 290.

[91] Evans v. Weatherhead, 24 R. I. 394, 53 Atl. 286.

[92] Douthart v. Logan, 190 Ill. 243, 60 N. E. 507 (affg. 86 Ill. App. 294).

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into a firm whether it was to continue a specified time, or be terminated at will, unless it was obtained by fraud.[93] In England a return of a part of the premium is allowed where the duration of the partnership was short, upon the theory of a partial failure of the consideration for the premium.[94] There is no right to an accounting partially, or as to particular items,[95] nor while the partnership continues, except in cases of extreme necessity.[96]

§ 660. Good-will of firm.—The good-will of the firm should be converted into cash and included in the firm accounts, as it is a part of the firm assets.[97] However, a partner may by his agreement or conduct lose his right to an accounting of the good-will of the firm.[98] Where a business has been conducted

[93] Harrington v. Walthal, 98 Ga. 776, 25 S. E. 836; Petrie v. Steedly, 94 Ga. 196, 21 S. E. 512; Durham v. Hartlett, 32 Ga. 22; McCandless v. Crouse, 220 Ill. 344, 77 N. E. 202; Crouse v. McCandless, 121 Ill. App. 237 (affd. 220 Ill. 344, 77 N. E. 202); Carlton v. Cummins, 51 Ind. 478; Swift v. Ward, 80 Iowa 700, 45 N. W. 1044, 11 L. R. A. 302; Boughner v. Black, 83 Ky. 521, 7 Ky. L. 562, 4 Am. St. 174; Gaty v. Tyler, 33 Mo. App. 494. See also Henderson v. Ries, 108 Fed. 709, 47 C. C. A. 625.

[94] Pease v. Hewitt, 31 Beav. 22, 8 Jur. (N. S.) 1166; Bury v. Allen, 1 Coll. 589, 66 Rev. Rep. 200, 28 Eng. Ch. 589; Freeland v. Stansfeld, 2 Eq. 1181, 1 Jur. (N. S.) 8, 23 L. J. Ch. 923; Bullock v. Crockett, 3 Giffard 507, 8 Jur. (N. S.) 502; Lyon v. Tweddell, 17 Ch. D. 529, 45 J. P. 680; Bluck v. Capstick, 12 Ch. D. 863; Lee v. Page, 7 Jur. (N. S.) 768; Yates v. Cousins, 60 L. T. Rep. (N. S.) 535; Brewer v. Yorke, 46 L. T. Rep. (N. S.) 289; Rawlins v. Wickham, 3 DeG. & J. 304; Jauncey v. Knowles, 29 L. J. Ch. 95, 1 L. T. (N. S.) 116; Eng. Partnership Act (1890), §§ 40, 41.

[95] Thompson v. Lowe, 111 Ind. 272, 12 N. E. 476; Walmsley v. Mendelsohn, 31 La. Ann. 152; Davis v. Davis, 60 Miss. 615.

[96] Lord v. Hull, 178 N. Y. 9, 70 N. E. 69, 102 Am. St. 484; Fairthorne v. Weston, 3 Hare 387, 8 Jur. 353.

[97] Rice v. Baggot, 54 Hun 637, 7 N. Y. S. 518, 4 Silv. 383, 27 N. Y. St. 181; Williams v. Wilson, 4 Sandf. Ch. (N. Y.) 379; Matter of Silkman, 121 App. Div. 202, 105 N. Y. S. 872 (affd. 190 N. Y. 560, 83 N. E. 1131); Hutchins v. Page, 204 Mass. 284, 90 N. E. 565, 134 Am. St. 656; Moore v. Rawson, 199 Mass. 493, 85 N. E. 586; Rammelsberg v. Mitchell, 29 Ohio St. 22. See In re Moore's Estate, 228 Pa. 523, 77 Atl. 902; Frear v. Lewis, 166 App. Div. 210, 151 N. Y. S. 486; In re Wood, 34 Ont. L. 278, 8 Ont. W. N. 583. Compare Hirschberg v. Backer, 150 Wis. 207, 149 N. W. 383.

[98] Didlake v. Grocery Co., 160 Ala. 484, 49 So. 384, 22 L. R. A. (N. S.) 907; Douthart v. Logan, 190 Ill. 243,

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at a loss, the good-will may be of no value.[99] It is held that the value of the good-will of a business at the death of a partner may be estimated by the annual profits before that time.[1] It is each partner's right to have the good-will of the business converted into cash,[2] if it has any value.[3] The rights of the purchaser of the good-will, and of a former partner after dissolution, were considered in a former chapter.[4]

§ 661. Other matters to be included in accounting.— Claims against a partner held by the firm should be charged against him on final settlement[5] and claims by a partner against

60 N. E. 507; Withers v. Mills, 153 N. Y. S. 1016; Kates v. Bok, 139 App. Div. 640, 124 N. Y. S. 297; Smith v. Wood, 12 N. Y. S. 724, 36 N. Y. St. 847; McCall v. Moschowitz, 14 Daly (N. Y.) 16, 1 N. Y. St. 99, 10 N. Y. Civ. Proc. 107; Van Dyke v. Jackson, 1 E. D. Smith (N. Y.) 419; Smith v. Greer, 7 Ont. L. Rep. 332; O'Keefe v. Curran, 17 Can. Sup. Ct. 596 (revg. 15 Ont. 84, affg. 15 Ont. App. 103). See Ryan v. Franklin, 199 N. Y. 347, 92 N. E. 673.

[99] Farwell v. Huling, 132 Ill. 112, 23 N. E. 438.

[1] Matter of Silkman, 121 App. Div. 202, 105 N. Y. S. 872 (affd. 190 N. Y. 560, 83 N. E. 1131).

[2] Brooklyn Trust Co. v. McCutchen, 189 Fed. 273. See Knapp v. Reed, 88 Nebr. 754, 130 N. W. 430, 32 L. R. A. (N. S.) 869n, Ann. Cas. 1912 B, 1095n; Griffith v. Kirley, 189 Mass. 522, 76 N. E. 201; Moore v. Rawson, 185 Mass. 264, 70 N. E. 64; McMurtrie v. Guiler, 183 Mass. 451, 67 N. E. 358; Iman v. Inkster, 90 Nebr. 704, 134 N. W. 265; Sheppard v. Boggs, 9 Nebr. 257, 2 N. W. 370; Slater v. Slater, 175 N. Y. 143, 67 N. E. 244, 61 L. R. A. 796, 96 Am. St. 605; Read v. Mackay, 47 Misc. 435, 95 N. Y. S. 935, 17 N. Y. Ann. Cas. 43; Dayton v. Wilkes, 17 How. Pr. (N. Y.) 510; Snyder Mfg. Co. v. Snyder, 54 Ohio St. 86, 43 N. E. 325, 31 L. R. A. 657; In re Wood, 34 Ont. L. 278, 8 Ont. W. N. 583 (rev. 8 Ont. W. N. 267); Townsend v. Jarman [1900], 2 Ch. 698, 69 L. J. Ch. 823, 83 L. T. Rep. 366, 49 Wkly. Rep. 158.

[3] Snyder Mfg. Co. v. Snyder, 54 Ohio St. 86, 43 N. E. 325, 31 L. R. A. 657; In re Musselman's Appeal, 62 Pa. St. 81, 1 Am. Rep. 382; Dyer v. Shove, 20 R. I. 259, 38 Atl. 498; Rice v. Angell, 73 Tex. 350, 11 S. W. 338, 3 L. R. A. 769.

[4] See ch. 12.

[5] Reynolds v. Locke, 218 Fed. 442, 134 C. C. A. 242; Cooper v. Olcott, 1 App. Cas. (D. C.) 123; Scroggs v. Cunningham, 81 Ill. 110; Francis v. Shearer, 16 S. W. 365, 17 S. W. 165, 13 Ky. L. 283; Silver v. St. Louis &c. R. Co., 72 Mo. 194 (affg. 5 Mo. App. 381); Tygart v. Wilson, 39 App. Div. 58, 56 N. Y. S. 827; Brown v. McFarland, 41 Pa. St. 129, 80 Am. Dec. 598; Gorman v. Madden, 27 S. Dak. 319, 131 N. W. 290; Hancock v. Heaton, 22 Wkly. Rep. 784 (affg. 30 L. T. Rep. (N. S.) 592); Wright v. Kane (Nov. Sc.), Cass. Dig. 596;

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the firm on firm transactions should be credited to him.[6] Claims concerning individual transactions between partners and not connected with partnership affairs have no place in a partnership accounting.[7] If the rights of creditors have not attached, as between partners there can be no objection if an individual debt from one to the other is deducted from a partnership balance due to the former from the latter.[8] Transactions connected with winding up firm affairs or the completion of firm contracts after dissolution should be included in the final settlement,[9] and partners who have made individual use of firm property after dissolution, must account,[10] but any other transactions between partners after dissolution, which occasion merely individual liability from one to the other, should not be included.[11] Unless there is

Eng. Partnership Act (1890), §§ 29, 30. See Royster v. Johnson, 73 N. Car. 474.

[6] Northen v. Tatum, 164 Ala. 368, 51 So. 17; Roberts v. Eldred, 73 Cal. 394, 15 Pac. 16; Ruth v. Flynn, 26 Colo. App. 171, 142 Pac. 194; Gandolfo v. Appleton, 40 N. Y. 533; Parker v. Parker, 65 Barb. (N. Y.) 205; Whittle v. McFarlane, 1 Knapp 311, 12 Eng. Reprint 338; Lawton Saw Co. v. Machum, 2 N. Brunsw. Eq. 191.

[7] Nims v. Nims, 23 Fla. 69, 1 So. 527; Bishop v. Pendley, 138 Ga. 738, 76 S. E. 63; Berry v. Powell, 18 Ill. 98; McMahon v. Brown, 219 Mass. 23, 106 N. E. 576; Goldthwait v. Day, 149 Mass. 185, 21 N. E. 359; Vaiden v. Hawkins (Miss.), 6 So. 227 (1889); Crocker v. Barteau, 212 Mo. 359, 110 S. W. 1062; Reid v. McQuesten, 61 N. H. 421; Caldwell v. Leiber, 7 Paige (N. Y.) 483; Looney v. Gillenwaters, 11 Heisk. (Tenn.) 133.

[8] Jones v. Jones, 23 Ark. 212; Parker v. Parker, 65 Barb. (N. Y.) 205.

[9] Little v. Caldwell, 101 Cal. 553, 36 Pac. 107, 40 Am. St. 89; Davenport v. Henderson, 47 Ill. 74; Perkins v. Stern, 152 Mass. 518, 25 N. E. 969; Cowham v. Shipman, 164 Mich. 419, 129 N. W. 678; Thompson v. Noble, 108 Mich. 19, 65 N. W. 563; Beller v. Murphy, 139 Mo. App. 663, 123 S. W. 1029; Harris v. Rosenberg, 161 Pa. St. 367, 29 Atl. 44; Kennedy v. Hill, 89 S. Car. 462, 71 S. E. 974; Carrere v. Whaley, 17 S. Car. 595; McClean v. Kennard, L. R. 9 Ch. 336, 43 L. J. Ch. 323.

[10] Ligare v. Peacock, 109 Ill. 94; Freeman v. Freeman, 136 Mass. 260; McGraw v. Dole, 63 Mich. 1, 29 N. W. 477; Chittenden v. Witbeck, 50 Mich. 401, 15 N. W. 526; Grier v. Strother, 153 Mo. App. 292, 133 S. W. 404; Pine v. Ormsbee, 2 Abb. Pr. (N. S.) (N. Y.) 375; Stoughton v. Lynch, 2 Johns. Ch. (N. Y.) 209.

[11] Patterson v. Kellogg, 53 Conn. 38, 22 Atl. 1096; Goodburn v. Stevens, 5 Gill. (Md.) 1; Candler v. Stange, 53 Mich. 479, 19 N. W. 154; Tennant v. Guy, 49 Hun 610, 3 N. Y. S. 697, 19 N. Y. St. 667; Broughton

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an agreement therefor, express or implied, there is no right to bring into the accounting matters connected with a previous partnership.[12] Where the partnership was formed to sell land under an option, and the land was not sold within the time expressed in the option, this does not prevent the profits from being considered part of the firm assets.[13]

§ 662. **Distribution, generally.**—Upon an accounting between partners, it is usually necessary, in order to determine the respective rights of each partner, to first determine the rights of third persons. The general rule is thus stated:[14] "Undoubtedly, the usual order of distribution of the assets of a copartnership upon dissolution is as stated by counsel, to wit: (1) Payment of the debts or liabilities due third persons; (2) repaying to each partner his advances; (3) repaying to each partner his capital; (4) division of the balance as profits. While this is the usual order, it may be altered by agreement of the parties, and in this case we think, from the evidence and the conditions under which the copartnership was formed and the firm business transacted, the referee correctly determined that the amount contributed by the several partners was to be considered as assets of the firm, and to be distributed accordingly." In one case[15] the court held that: "The sum advanced must be repaid before the surplus can be ascertained; and from that surplus alone can there be a contribution; then to each partner equally; and if a loss is incurred, its ratio must be ascertained as originally agreed by the parties." In other words, the law holds that the primary fund for the payment of losses is the capital, and that, consequently, the capital must share last in any of the assets of the firm, upon distribution, making the partners, as such, bear

v. Broughton, 44 L. J. Ch. 526, 23 Wkly. Rep. 770; Cane v. Macdonald, 10 Brit. Col. 444; O'Lone v. O'Lone, 2 Grant Ch. (U. C.) 125.

[12] Burchard v. Boyce, 21 Ga. 6; Beeson's Appeal, 1 Sad. (Pa.) 465, 2 Atl. 683; Nicholson v. Kinsey (Tenn.), 38 S. W. 1033 (1896); Toulmin v. Copland, 3 Y. & C. 625 (affd. 7 Cl. & F. 350).

[13] Thomas v. Hollingsworth, 181 Ind. 411, 103 N. E. 840.

[14] Groth v. Kersting, 23 Colo. 213, 47 Pac. 393 (1896).

[15] Leserman v. Bernheimer, 113 N. Y. 39, 20 N. E. 869 (1889).

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the losses first. The creditors of the firm are entitled first to any assets distributed, according to their respective priorities. The individual partners who may also be creditors, as such, of the firm, are likewise entitled to partake of the assets before any partner, as a partner, may participate therein, but are second to nonpartner creditors, inasmuch as each partner is, as heretofore shown, liable personally for firm debts, and if he were allowed to participate equally with other creditors, and there should be a deficit, and creditors not be paid in full, it would result in a multiplicity of suits, in collecting back the creditor partner's dividend for the benefit of nonpartner creditors, upon his partnership liability. After all creditors are paid in full, the remaining assets, if any, go to the partners as such, and if the assets are exhausted before all creditors are fully paid, the partners are personally liable for such amount as will pay creditors. Even among nonpartner creditors there may be priorities, by reason of judgments, or other liens. Taxes, costs, etc., are by law in most states, made a first claim upon the firm assets in an accounting. As between the partners themselves, the partnership contract may change the usual rule of distribution, and it may even be stipulated that one or more, less than all, of the partners share all the loss, or that remaining assets shall be distributed to part. In such cases, excepting agreements against public policy, or fraudulent, the law will follow the agreement of the parties as to distribution, as between themselves.

§ 663. Rules for distribution—Uniform Partnership Act. —The Uniform Partnership Act provides the following rules for distribution:[10] "In settling accounts between the partners after dissolution, the following rules shall be observed, subject to any agreement to the contrary: (a) The assets of the partnership are: I. The partnership property, II. The contributions of the partners necessary for the payment of all the liabilities specified in clause (b) of this paragraph. (b) The liabilities of the partnership shall rank in order of payment, as follows: I. Those

[10] Uniform Partnership Act. § 40.

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owing to creditors other than partners, II. Those owing to partners other than for capital and profits, III. Those owing to partners in respect of capital, IV. Those owing to partners in respect of profits. (c) The assets shall be applied in the order of their declaration in clause (a) of this paragraph to the satisfaction of the liabilities. (d) The partners shall contribute, as provided by section 18 (a), the amount necessary to satisfy the liabilities; but if any, but not all, of the partners are insolvent, or, not being subject to process, refuse to contribute, the other partners shall contribute their share of the liabilities, and, in the relative proportions in which they share the profits, the additional amount necessary to pay the liabilities. (e) An assignee for the benefit of creditors or any person appointed by the court shall have the right to enforce the contributions specified in clause (d) of this paragraph. (f) Any partner or his legal representative shall have the right to enforce the contributions specified in clause (d) of this paragraph, to the extent of the amount which he has paid in excess of his share of the liability. (g) The individual property of a deceased partner shall be liable for the contributions specified in clause (d) of this paragraph. (h) When partnership property and the individual properties of the partners are in the possession of a court for distribution, partnership creditors shall have priority on partnership property and separate creditors on individual property, saving the rights of lien or secured creditors as heretofore. (i) Where a partner has become bankrupt or his estate is insolvent the claims against his separate property shall rank in the following order: I. Those owing to separate creditors, II. Those owing to partnership creditors, III. Those owing to partners by way of contribution."

§ 664. Determining partner's share—In general.—The determination of a partner's share is made by a conversion of the firm's assets into money, payment of firm obligations, and division of the balance in the proportions to which each partner is entitled.[17] Other methods of determination may be followed by

[17] Torbe v. Strauss, 155 Wis. 518, 144 N. W. 184, 1136; Moore v. Huntington, 17 Wall. (U. S.) 417, 21 L. ed. 642; Sigourney v. Munn, 7 Conn.

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agreement.[18] Whenever a partner has taken and kept a portion of the firm assets and prevented their valuation, or sale, he may be charged with their fair value.[19] Valueless portions of the firm assets should not be included in reckoning the value of a partner's share.[20] Property contributed by a partner to the firm should be credited at an agreed price or with its fair valuation.[21] It is held that an offer to purchase may be regarded as the basis of the value of the assets, although the name of the proposed purchaser is not revealed.[22]

§ 665. Discharge of partnership liabilities.—It is a fundamental and elementary rule of partnership law which has been many times stated in this work that the primary liability of partnership assets is to pay partnership creditors.[23] Therefore, all

11; Austin v. Da Rocha, 23 La. Ann. 44; Darby v. Darby, 3 Drew 495, 2 Jur. (N. S.) 271; Eng. Partnership Act (1890), § 39. See Kennedy v. Hill, 89 S. Car. 462, 71 S. E. 974; Machuca v. Chuidian, 2 Philippine 210.

[18] Coffey v. Coffey, 210 Mass. 480, 96 N. E. 1027; Phillips v. Crownfield, 124 Md. 443, 92 Atl. 1030; Chapin v. Chapin (Mass.), 36 N. E. 746 (1894); Quinlivan v. English, 42 Mo. 362; Van Horn v. Van Horn (N. J.), 20 Atl. 826; Marquand v. New York Mfg. Co., 17 Johns. (N. Y.) 525; Holloway v. Frick, 149 Pa. St. 178, 24 Atl. 201; Kennedy v. Hill, 89 S. Car. 462, 71 S. E. 974; Veck v. Culbertson (Tex. Civ. App.), 42 S. W. 253; Bell v. Barnett, 21 Wkly. Rep. 119.

[19] Gillett v. Hall, 13 Conn. 426; Thomas v. Winchester Bank, 105 Ky. 694, 49 S. W. 539, 20 Ky. L. 1502; Bush v. Guion, 6 La. Ann. 797; Hutchins v. Page, 204 Mass. 284, 90 N. E. 565, 134 Am. St. 656; Randle v. Richardson, 53 Miss. 176; Phillips v. Reeder, 18 N. J. Eq. 95; Turner v. Weston, 133 N. Y. 650, 31 N. E. 91; White v. Reed, 124 N. Y. 468, 26 N. E. 1037; Peck v. Knapp, 137 N. Y. S. 70; Barclay's Appeal, 5 Sad. (Pa.) 26, 8 Atl. 169; Evans v. Weatherhead, 24 R. I. 394, 53 Atl. 286; Stinson v. Barley (Va.), 4 S. E. 531 (1892). See Oustad v. Hahn, 27 N. Dak. 334, 146 N. W. 557.

[20] Douthart v. Logan, 190 Ill. 243, 60 N. E. 507 (affg. 86 Ill. App. 294).

[21] Wolf v. Levi, 33 S. W. 418, 17 Ky. L. 1024; Flagg v. Stowe, 85 Ill. 164; Scudder v. Budd, 52 N. J. Eq. 320, 26 Atl. 904; Goldman v. Rosenberg, 116 N. Y. 78, 22 N. E. 259; Leonard v. Martin, 52 Barb. (N. Y.) 113; Frierson v. Morrow (Tenn.), 48 S. W. 245 (1898); Cooke v. Benbow, 3 DeG., J. & S. 1, 6 New Rep. 135.

[22] Peck v. Knapp, 137 N. Y. S. 70.

[23] See ch. 17. See also ante §§ 662, 663.

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firm debts must be paid before any partner is entitled to any portion of the assets of the firm.[24] "Until the creditors are paid no member of the firm can recover, for his own use, any part of the partnership assets."[25] Further, before a partner can claim a portion of the firm assets to his own use, debts of the firm to partners must be paid, this being the second liability imposed on the partnership assets,[26] and interest on advancements to a partner, if there is an express or implied agreement to pay interest.[27]

§ 666. Contribution—Repayment of advances.—Partners after the partnership has been closed[28] or where there is an agree-

[24] Honore v. Colmesnil, 1 J. J. Marsh. (Ky.) 506; Brewer v. Johnson (Ark.), 112 S. W. 364; Bishop v. Pendley, 138 Ga. 738, 76 S. E. 63; Page v. Thompson, 33 Ind. 137; Hirsch-Wickwire Co. v. Denison Clothing Co., 158 Iowa 117, 138 N. W. 1101; Ward v. Brandt, 11 Mart. (O. S.) (La.) 331, 13 Am. Dec. 352; Mourain v. Delamarre, 2 La. Ann. 142; Conkling v. Washington University, 2 Md. Ch. 497; Pease v. Rush, 2 Minn. 107 (Gil. 89); Gaines v. Coney, 51 Miss. 323; Lawson v. Dunn, 66 N. J. Eq. 90, 57 Atl. 415; Burger v. Robinson, 81 Misc. 678, 143 N. Y. S. 530; Woolverton v. Austin, 57 App. Div. 347, 68 N. Y. S. 47; Martin v. Carlisle (Okla.), 148 Pac. 833; White v. Union Ins. Co., 1 Nott & McC. (S. Car.) 556, 9 Am. Dec. 726. A partner in an equitable action for an accounting has the right to require payments by the other partner from firm funds to be applied to firm debts, and that nothing shall be credited on a copartner's debts, save payments by him from his individual funds. Hirsch-Wickwire Co. v. Denison Clothing Co., 158 Iowa 117, 138 N. W. 1101.

[25] Powell v. Bennett, 131 Ind. 465, 30 N. E. 518.

[26] Henderson v. Ries, 108 Fed. 709, 47 C. C. A. 625; Nims v. Nims, 23 Fla. 69, 1 So. 527; Snell v. De Land, 136 Ill. 533, 27 N. E. 183; Whitney v. Whitney, 115 Ky. 552, 24 Ky. L. 2465, 74 S. W. 194, 88 S. W. 311, 27 Ky. L. 1197; Matthews v. Adams, 84 Md. 143, 35 Atl. 60; Beck v. Thompson, 22 Nev. 368, 40 Pac. 516; Mason v. Gibson, 73 N. H. 190, 60 Atl. 96; Leserman v. Bernheimer, 113 N. Y. 39, 20 N. E. 869; Rodgers v. Clement, 15 App. Div. 561, 44 N. Y. S. 516 (revd. on other grounds in 162 N. Y. 422, 56 N. E. 901, 76 Am. St. 342); Christman v. Baurichter, 31 Leg. Int. (Pa.) 68, 10 Phila. 115; Robertson v. Read, 17 Grat. (Va.) 544; Gorman v. Madden, 27 S. Dak. 319, 131 N. W. 290; Bury v. Allen, 1 Coll. 589, 66 Rev. Rep. 200, 28 Eng. Ch. 589. See ch. 17, on application of assets. See also ante §§ 662, 663, on distribution.

[27] Thomas v. Winchester Bank, 105 Ky. 694, 49 S. W. 539, 20 Ky. L. 1502; Lee v. Lashbrooke, 8 Dana (Ky.) 214; Young v. Barras, 74 Mich. 343, 42 N. W. 42; Folsan v. Marlette, 23 Nev. 459, 49 Pac. 39; Rodgers v. Clement, 162 N. Y. 422, 56 N. E. 901, 76 Am. St. 342.

[28] Johnson v. Peck, 58 Ark. 580,

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ment between such partners to adjust a single item without a general accounting,[29] may enforce contributions when the parties are in equity, and one of them has been compelled to pay the whole or more than his share on the obligation,[30] and if there are no firm assets with which to indemnify such partner, he has a right to compel his copartners to contribute,[31] equally if there is no agreement,[32] otherwise in the proportion in which profits are to be shared.[33] Where some of the partners are insolvent, or are

25 S. W. 865; Mussetter v. Timmerman, 11 Colo. 201, 17 Pac. 504; Burgess v. Badger, 124 Ill. 288, 14 N. E. 850; Downs v. Jackson, 33 Ill. 464, 85 Am. Dec. 289; Warring v. Hill, 89 Ind. 497; Tibbetts v. Magruder, 9 Dana (Ky.) 79; Maginnis v. Crosby, 11 La. Ann. 400; Smith v. Ayrault, 71 Mich. 475, 39 N. W. 724, 1 L. R. A. 311; Wendlandt v. Sohre, 37 Minn. 162, 33 N. W. 700; Bohrer v. Drake, 33 Minn. 408, 23 N. W. 840; Lyons v. Murray, 95 Mo. 23, 8 S. W. 170, 6 Am. St. 17; Mendez v. Schleuter, 9 N. Y. S. 278, 30 N. Y. St. 150; Buie v. Kennedy, 164 N. Car. 290, 80 S. E. 445; Gardner v. Conn, 34 Ohio St. 187; Jenkins v. Jenkins, 66 Ore. 12, 132 Pac. 542; Wall v. Fife, 37 Pa. St. 394; Brown v. Agnew, 6 Watts & S. (Pa.) 235; Gorman v. Madden, 27 S. Dak. 319, 131 N. W. 290; Isler v. Outlaw, 4 Humph. (Tenn.) 118; Sullivan v. Sullivan, 122 Wis. 326, 99 N. W. 1022; Wells v. McGeoch, 71 Wis. 196, 35 N. W. 769; Honsinger v. Love, 16 Ont. 170.

[29] Foster v. Allanson, 2 T. R. 479; Blakely v. Graham, 111 Mass. 8; Gibson v. Moore, 6 N. H. 547.

[30] "The right to contributions being founded in natural justice, is not restricted to any special relation, but applies to original contractors, or any other relation, where equity between the parties is equality of burden, and one discharges more than his share of the common obligation." Bragg v. Patterson, 85 Ala. 233, 4 So. 716.

[31] Burgess v. Badger, 124 Ill. 288, 14 N. E. 850; Warring v. Hill, 89 Ind. 497; Tibbetts v. Magruder, 9 Dana (Ky.) 79; Maginnis v. Crosby, 11 La. Ann. 400; Smith v. Ayrault, 71 Mich. 475, 39 N. W. 724, 1 L. R. A. 311; Bohrer v. Drake, 33 Minn. 408, 23 N. W. 840; Lyons v. Murray, 95 Mo. 23, 8 S. W. 170, 6 Am. St. 17; Mendez v. Schleuter, 9 N. Y. S. 278, 30 N. Y. St. 150; Buie v. Kennedy, 164 N. Car. 290, 80 S. E. 445; Gardner v. Conn, 34 Ohio St. 187; Jenkins v. Jenkins, 66 Ore. 12, 132 Pac. 542; Wall v. Fife, 37 Pa. St. 394; Gorman v. Madden, 27 S. Dak. 319, 131 N. W. 290; Isler v. Outlaw, 4 Humph. (Tenn.) 118; Danforth v. Levin (Tex. Civ. App.), 156 S. W. 569; Sullivan v. Sullivan, 122 Wis. 326, 99 N. W. 1022; Honsinger v. Love, 16 Ont. 170; Lamb v. North, 22 Man. 360; Ex parte Good, 5 Ch. Div. 46, 46 L. J. Bankr. 65, 35 L. T. Rep. (N. S.) 554; Sedgwick v. Daniell, 2 H. & N. 319, 27 L. J. Exch. 116; Eng. Partnership Act (1890), § 24; Cal. Civ. Code, § 1432.

[32] Yatsuyanage v. Shimamura, 59 Wash. 24, 109 Pac. 282; Eng. Partnership Act (1890), § 24 (1).

[33] Flagg v. Stowe, 85 Ill. 164; Whit-

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nonresidents, the others must contribute to the loss as if the insolvent or nonresident partners were not members of the firm.[34] This duty of contribution is probably imposed by law as an element of the relation,[35] though it has been said to arise from the implied agreement of the parties.[36] The right to enforce contribution may be lost by misconduct,[37] or contracted away.[38] It was seen that debts owing to a partner by the firm for advances made to it in addition to capital must be repaid in full if firm assets are sufficient, otherwise ratably, before his share can be ascertained.[39] He should be credited with all moneys properly expended, for the common enterprise, whether of material benefit or not.[40] A partner should be charged with advances made by the firm to him individually,[41] and if his share in firm profits or firm assets are insufficient to repay his share he is

comb v. Converse, 119 Mass. 38, 20 Am. Rep. 311; In re Albion L. Assur. Soc., 16 Ch. Div. 83.

[34] Whitcomb v. Converse, 119 Mass. 38, 20 Am. Rep. 311; Whitman v. Porter, 107 Mass. 522; Scott v. Bryan, 96 N. Car. 289, 3 S. E. 235; Henry v. Jackson, 37 Vt. 431; Lamb v. North, 22 Man. 360; Ex parte Plowden, 2 Deac. 456, 3 Mont. & A. 402.

[35] Pollock Dig. Partnership (5th ed.), 72.

[36] Sells v. Hubbell, 2 Johns. Ch. (N. Y.) 394; Wright v. Hunter, 1 East 20, 5 Ves. Jr. 792, 31 Eng. Reprint 861.

[37] Morris v. Neel, 78 Ga. 797, 3 S. E. 643; Clayton v. Davett (N. J. Eq.), 38 Atl. 308 (1897); Thomas v. Atherton, 10 Ch. D. 185, 48 L. J. Ch. 370, 40 L. T. (N. S.) 77.

[38] McCormick v. Stofer, 12 S. W. 151, 11 Ky. L. Rep. 398; Scudder v. Ames, 142 Mo. 187, 43 S. W. 659; McFadden v. Leeka, 48 Ohio St. 513, 28 N. E. 874; Magilton v. Stevenson, 173 Pa. St. 560, 34 Atl. 235.

[39] Nims v. Nims, 23 Fla. 69, 1 So. 527; Allen v. Hawley, 6 Fla. 142, 63 Am. Dec. 198; Heffron v. Gore, 40 Ill. App. 257; Turner v. Turner, 9 Ky. L. 456, 5 S. W. 457; Matthews v. Adams (Md.), 33 Atl. 645; Conkling v. Washington University, 2 Md. Ch. 497; Young v. Barras, 74 Mich. 343, 42 N. W. 42; Beck v. Thompson, 22 Nev. 368, 40 Pac. 516; Leserman v. Bernheimer, 113 N. Y. 39, 20 N. E. 869; Huey v. Christ, 232 Pa. 131, 81 Atl. 159; Christman v. Baurichter, 31 Leg. Int. (Pa.) 68, 10 Phila. 115; Gorman v. Madden, 27 S. Dak. 319, 131 N. W. 290; Ex parte Shepherd, 3 Tenn. Ch. 189. See ante § 665, on discharge of partnership liabilities.

[40] Campbell v. Northwest Eckington Imp. Co., 229 U. S. 561, 57 L. ed. 1330, 33 S. Ct. 796, revg. decree 36 App. D. C. 149.

[41] Sandias v. Mustacchi, 153 App. Div. 810, 138 N. Y. S. 875; Gorman v. Madden, 27 S. Dak. 319, 131 N. W. 290.

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personally liable for the remainder.[42] It is provided by the Uniform Partnership Act that, in the absence of agreement, "each partner shall be repaid his contributions, whether by way of capital or advances to the partnership property, and share equally in the profits and surplus remaining after all liabilities, including those to partners, are satisfied; and must contribute toward the losses, whether of capital or otherwise, sustained by the partnership according to his share in the profits."[43] And that "the partnership must indemnify every partner in respect to payments made and personal liabilities reasonably incurred by him in the ordinary and proper conduct of its business, or for the preservation of its business or property."[44]

§ 667. Compensation for services and expenses of winding up business.—As a general rule, there is no right to compensation for services after dissolution in winding up the firm business, since each partner is under a duty implied from the relation to render his services in winding up,[45] or, generally

[42] Sandias v. Mustacchi, 153 App. Div. 810, 138 N. Y. S. 875; Gorman v. Madden, 27 S. Dak. 319, 131 N. W. 290.

[43] Uniform Partnership Act, § 18 (a).

[44] Uniform Partnership Act, § 18 (c).

[45] Lyman v. Lyman, 2 Paine 11, Fed. Cas. No. 8628; Shelton v. Knight, 68 Ala. 598; Kimball v. Lincoln, 5 Ill. App. 316; McFarland v. McCormick, 114 Iowa 368, 86 N. W. 369; Wiggins v. Brand, 202 Mass. 141, 88 N. E. 840; Hoag v. Alderman, 184 Mass. 217, 68 N. E. 199; Dunlap v. Watson, 124 Mass. 305; Loomis v. Armstrong, 49 Mich. 521, 14 N. W. 505; Lamb v. Wilson, 3 Nebr. (Unof.) 496, 92 N. W. 167; Burgess v. Badger, 83 Hun 488; 31 N. Y. S. 614, 64 N. Y. St. 327; Ames v. Downing, 1 Bradf. Sur. (N. Y.) 321; Hellman v. Mendel, 6 Ohio Dec. (reprint) 829, 8 Am. L. Rec. 360; Stockdale v. Maginn, 207 Pa. 226, 56 Atl. 439; Brown v. McFarland, 41 Pa. St. 129, 80 Am. Dec. 598; Beatty v. Wray, 19 Pa. St. 516, 57 Am. Dec. 677; Murphy v. Marvel, 49 Pa. Super. Ct. 576; Brien v. Harriman, 1 Tenn. Ch. 467; Phoenix Land Co. v. Exall (Tex. Civ. App.), 159 S. W. 474; Forrer v. Forrer, 29 Grat. (Va.) 134; Sandberg v. Scougale, 75 Wash. 313, 134 Pac. 1051; Smith v. Brown, 44 W. Va. 342, 30 S. E. 160; Liggett v. Hamilton, 24 Can. Sup. Ct. 665; Livingston v. Livingston, 7 Ont. W. N. 406 (mod. 26 Ont. L. 246); Macdonald v. Richardson, 1 Giffard 81, 5 Jur. (N. S.) 9, 10 L. T. Rep (N. S.) 166; Whittle v. McFarlane, 1 Knapp 311, 12 Eng. Reprint 338; Eng. Partnership Act (1890), § 24 (6); Cal. Civ. Code, § 2413. See ante § 352.

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speaking, for any other services.[46] But there may be an express,[47] or implied agreement for compensation which the courts will enforce;[48] or compensation may sometimes be allowed for services more than ordinarily beneficial;[49] or where the misconduct of a copartner has made them necessary;[50] or, in many jurisdictions, to a surviving partner who winds up affairs after his copartner's death.[51] "There are certain well-recognized exceptions to the general rule where the circumstances are extraordinary and more is done by the surviving partner than the mere work of selling the property, receiving the moneys due the firm, paying the debts and making distribution. Thus where it is necessary to continue the business to realize the most from the assets, and the continuance is by authority of law and is assented to by the legal representative, or to continue it to complete specific work undertaken by the partnership and unfinished at the time of the death of one partner and the completion of the work requires a large amount of work to be done by the survivor, principles of equity permit an allowance for the extra service. And even when the business is continued by the survivor without the consent of the personal representative and a profit is realized, such survivor is usually entitled to compensation if the estate elects to share in the profits."[52] By the Uniform Partner-

[46] See ch. 13, § 350 et seq.

[47] Gray v. Hamil, 82 Ga. 375, 10 S. E. 205, 6 L. R. A. 72; Pierce v. Cubberly, 19 Ind. 157; Garretson v. Brown, 185 Pa. St. 447, 40 Atl. 293; Murphy v. Marvel, 49 Pa. Super. 576.

[48] Utley v. Smith, 24 Conn. 290, 63 Am. Dec. 163; Maynard v. Richards, 166 Ill. 466, 46 N. E. 1138, 57 Am. St. 145 (affirming 61 Ill. App. 336); Honore v. Colmesnil, 1 J. J. Marsh. (Ky.) 506; Hutchinson v. Onderdonk, 6 N. J. Eq. 277 (revd. on the facts in 6 N. J. Eq. 632); Bradley v. Chamberlin, 16 Vt. 613.

[49] Jones v. Marshall, 24 Idaho 678, 135 Pac. 841; Maynard v. Richards, 166 Ill. 466, 46 N. E. 1138, 57 Am. St. 145 (aff. 61 Ill. App. 337); Thayer v. Badger, 171 Mass. 279, 50 N. E. 541; Lamb v. Wilson, 3 Nebr. (Unof.) 496, 92 N. W. 167; McCullough v. Barr, 145 Pa. St. 459, 22 Atl. 962; In re Zell's Appeal, 126 Pa. St. 329, 17 Atl. 647.

[50] Mattingly v. Stone, 35 S. W. 921, 18 Ky. L. 187; Clement v. Ditterline, 11 S. W. 658, 11 Ky. L. 294; Airey v. Borham, 29 Beav. 620, 4 L. T. Rep. (N. S.) 391, 54 Eng. Reprint 768.

[51] See ch. 20, § 637.

[52] Harrah v. Dyer, 180 Ind. 229, 102 N. E. 14.

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ship Act: "No partner is entitled to remuneration for acting in the partnership business, except that a surviving partner is entitled to reasonable compensation for his services in winding up partnership affairs."[53] Reasonable expenses lawfully incurred by a partner upon winding up should be allowed to a partner's credit.[54]

§ 668. Interest.—As a general rule there is no right to interest on capital,[55] unless it has been so agreed,[56] and then there is no right to interest after dissolution.[57] Generally there is no right to interest on balances, in the absence of agreement.[58] Where a partner holds balances after dissolution, he is not to be charged with interest unless there is an agreement,[59] or the

[53] Uniform Partnership Act, § 18 (f).

[54] Lewis v. Loper, 54 Fed. 237; Brownell v. Steere, 128 Ill. 209, 21 N. E. 3 (affg. 29 Ill. App. 358); Pratt v. McHatton, 11 La. Ann. 260; Tyng v. Thayer, 8 Allen (Mass.) 391; Converse v. Hobbs, 64 N. H. 42, 5 Atl. 832; Peck v. Knapp, 137 N. Y. S. 70; Rockefeller v. Morehouse, 4 Ohio Dec. 247 (1 Clev. L. Rep. 158); In re Kalbfell, 27 Pittsb. Leg. J. (N. S.) 210; Bufford v. Ashcroft, 72 Tex. 104, 10 S. W. 346; Fish v. Thompson, 68 Vt. 273, 35 Atl. 174; Sandberg v. Scougale, 75 Wash. 313, 134 Pac. 1051.

[55] Julliard v. Orem, 70 Md. 465, 17 Atl. 333; St. Paul Trust Co. v. Finch, 52 Minn. 342, 54 N. W. 190; Rodgers v. Clement, 162 N. Y. 422, 56 N. E. 901, 76 Am. St. 342; Brenner v. Carter, 10 Pa. Dist. 457; Wilson v. McCarty, 13 Can. L. J. (N. S.) 303; Jardine v. Hope, 19 Grant. Ch. (U. C.) 76. See ante, § 362.

[56] Taft v. Schwamb, 80 Ill. 289; Keiley v. Turner, 81 Md. 269, 31 Atl. 700; Wells v. Babcock, 56 Mich. 276, 22 N. W. 809, 27 N. W. 575; Kennedy v. Hill, 89 S. Car. 462, 71 S. E. 974; Bartlett v. Boyles, 66 W. Va. 327; Barfield v. Loughborough, L. R. 8 Ch. 1.

[57] St. Paul Trust Co. v. Finch, 52 Minn. 342, 54 N. W. 190; Lesserman v. Bernheimer, 45 Hun 590, 10 N. Y. St. 47; Mosapp v. Stevens, 158 App. Div. 874, 142 N. Y. S. 690.

[58] Falkner v. Hendy, 80 Cal. 636, 22 Pac. 401; McFarland v. McCormick, 114 Iowa 368, 86 N. W. 369; Bradley v. Brigham, 137 Mass. 545; Kirkwood v. Smith, 132 App. Div. 758, 117 N. Y. S. 686; Van Loon v. Lindsay, 12 (Pa.) Luz. Leg. Reg. (N. S.) 93; Barfield v. Loughborough, L. R. 8 Ch. 1. See ante, § 362.

[59] Wilson v. Wilkinson, 97 Ga. 814, 25 S. E. 908; Ashbrook v. Ashbrook, 28 S. W. 660, 16 Ky. L. 593; Lamb v. Rowan, 83 Miss. 45, 35 So. 427, 690; Campbell v. Coquard, 93 Mo. 474, 6 S. W. 360; Smith v. Smith, 18 R. I. 722, 29 Atl. 584, 30 Atl. 602; Hart v. Hart, 117 Wis. 639, 94 N. W. 890; Ewing v. Ewing, 8 App. Cas. 822; Pim v. Harris, Ir. R. 10 Eq. 442; Beater v. Murray, 19 Wkly. Rep.

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equitable circumstances seem to require a charge of interest,[60] as where he holds the money for an unreasonable time,[61] or wrongfully refuses to turn it over.[62] Ordinarily, the right of a partner to interest on advances is recognized,[63] though in some states the contrary is held, unless authorized by agreement.[64]

92; Watney v. Wells, 9 Jur. (N. S.) 396, 32 L. J. Ch. 194.

[60] Donahue v. McCosh, 70 Iowa 733, 30 N. W. 14; Lovejoy v. Bailey, 214 Mass. 134, 101 N. E. 63; Leserman v. Bernheimer, 113 N. Y. 39, 20 N. E. 869; Johnson v. Hartshorne, 52 N. Y. 173; Stoughton v. Lynch, 2 Johns. Ch. (N. Y.) 209; Beacham v. Eckford, 2 Sandf. Ch. (N. Y.) 116; Andrews v. Andrews, 3 Bradf. Sur. (N. Y.) 99; Holden v. Peace, 39 N. Car. 223, 45 Am. Dec. 514; In re Gyger's Appeal, 62 Pa. St. 73, 1 Am. Rep. 382; Swepson v. Davis (Tenn.), 60 S. W. 619 (1900); Hutcheson v. Smith, 5 Ir. Eq. 117. Compare Phillips v. Reynolds, 236 Ill. 119, 86 N. E. 193.

[61] Beale v. Beale (Ill.), 2 N. E. 65 (1885); Randolph v. Inman, 71 Ill. App. 176; Harrah v. Dyer, 180 Ind. 229, 102 N. E. 14; Hite v. Hite, 1 B. Mon. (Ky.) 177; Klotz v. Maccready, 39 La. Ann. 638, 2 So. 203; Wiggins v. Brand, 202 Mass. 141, 88 N. E. 840; Crabtree v. Randall, 133 Mass. 552; Dunlap v. Watson, 124 Mass. 305; Washburn v. Goodman, 17 Pick. (Mass.) 519; Blum v. Mayer, 189 N. Y. 153, 81 N. E. 780 (affg. 113 N. Y. App. Div. 247, 99 N. Y. S. 25); Johnson v. Hartshorne, 52 N. Y. 173; Steiger v. Bradley, 34 Wkly. Notes Cas. 123.

[62] Christian &c. Grocery Co. v. Hill, 122 Ala. 490, 26 So. 149; Sanderson v. Sanderson, 20 Fla. 292; Phillips v. Reynolds, 236 Ill. 119, 86 N. E. 193; Robbins v. Laswell, 58 Ill. 203; Sanders v. Scott, 68 Ind. 130; Turner v. Otis, 30 Kans. 1, 1 Pac. 19; Taylor v. Young, 2 Bush (Ky.) 428; Honore v. Colmesnil, 7 Dana (Ky.) 199; Bowling v. Dobyns, 5 Dana (Ky.) 434; Powell v. Horrell, 92 Mo. App. 406; Blum v. Mayer, 189 N. Y. 153, 81 N. E. 780 (affg. 113 N. Y. App. Div. 247, 99 N. Y. S. 25); White v. White, 55 N. Y. Super. Ct. 417, 14 N. Y. St. 738; Ahl v. Ahl, 186 Pa. St. 99, 40 Atl. 405; Corralitos Co. v. Mackay, 31 Tex. Civ. App. 316, 72 S. W. 624.

[63] McCall v. Moss, 112 Ill. 493; Wolf v. Levi, 33 S. W. 418, 17 Ky. L. 1024; Hoss' Succession, 42 La. Ann. 1022, 8 So. 833; Matthews v. Adams, 84 Md. 143, 35 Atl. 60; Keiley v. Turner, 81 Md. 269, 31 Atl. 700; Winchester v. Glazier, 152 Mass. 316, 25 N. E. 728, 9 L. R. A. 424; Dougherty v. Van Nostrand, 1 Hoff. Ch. (N. Y.) 68; Wayne v. Hinkle, 20 Wkly. L. Bul. 19 (affg. 9 Ohio Dec. 389, 12 Wkly. L. Bul. 282); Bufford v. Ashcroft, 72 Tex. 104, 10 S. W. 346; Bartlett v. Boyles, 66 W. Va. 327, 66 S. E. 474; Bennett v. McKay, 4 Newfoundl. 178, 462 (1879). See ante § 361.

[64] Prentice v. Elliott, 72 Ga. 154 (applying Code, § 2885); Lee v. Lashbrooke, 8 Dana (Ky.) 214; Holloway v. Turner, 61 Md. 217; Masury v. Whiton, 43 Hun 638, 6 N. Y. St. 697 (affd. 111 N. Y. 679, 18 N. E. 638, 2 Silv. Ct. App. 123); Holden

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It was said in a leading New York case:[65] "If the moneys advanced by the plaintiff to the firm were contributions of capital or additions to plaintiff's capital, then he was not entitled to interest on the same, since he must rely upon the profits of the business to compensate him for the investment, unless there was a special agreement between the partners that interest should be allowed:[66] But, on the other hand, if the moneys so paid or advanced by the plaintiff for the use of the firm were in fact loans, and the plaintiff as to such advances was a creditor of the firm, he stands upon the same footing as any other creditor with respect to the right to be allowed interest upon the accounting. A partner may loan money to the firm of which he is a member, and when he does his right to interest is to be determined in the same way as that of any other creditor. In such cases the general rule is to allow interest upon the advances, although there was no express agreement by the firm to pay it, in the absence of some agreement to the contrary, express or implied. The right to interest or an agreement to pay or allow it is to be implied in such cases without any express promise, as in like transactions between parties holding no partnership relation to each other:[67]

v. Peace, 39 N. Car. 223, 45 Am. Dec. 514; Dinham v. Bradford, L. R. 5 Ch. 519.

[65] Rodgers v. Clement, 162 N. Y. 422, 56 N. E. 901, 76 Am. St. 342.

[66] Citing in re James, 146 N. Y. 78, 40 N. E. 876, 48 Am. St. 774; Jackson v. Johnson, 74 N. Y. 607; Johnson v. Hartshorne, 52 N. Y. 173; Sandford v. Barney, 50 Hun 108, 4 N. Y. S. 500; Cheever v. Lamar, 19 Hun (N. Y.) 130; Jackson v. Johnson, 11 Hun (N. Y.) 509; Stoughton v. Lynch, 2 Johns. Ch. (N. Y.) 209; Collyer Partnership, § 318; Lindley Partnership, 389.

[67] Citing Ligare v. Peacock, 109 Ill. 94; Matthews v. Adams, 84 Md. 143, 35 Atl. 60; Baker v. Mayo, 129 Mass. 517; Morris v. Allen, 14 N. J. Eq. 44; Reid v. Rensselaer Glass Factory, 3 Cow. (N. Y.) 399; Rensselaer Glass Factory v. Reid, 5 Cow. (N. Y.) 587; Woerz v. Schumacher, 161 N. Y. 530, 56 N. E. 72; Chester v. Jumel, 125 N. Y. 237, 26 N. E. 297; Beach v. Colles, 85 N. Y. 511; Collender v. Phelan, 79 N. Y. 366; Gillet v. Van Rensselaer, 15 N. Y. 397; Liotard v. Graves, 3 Caines (N. Y.) 226; Foley v. Foley, 15 App. Div. 276, 44 N. Y. S. 588; Lloyd v. Carrier, 2 Lans. (N. Y.) 364; Hodges v. Parker, 17 Vt. 242, 44 Am. Dec. 331; In re German Min. Co., 4 DeG., M. & G. 19, 35; In re Norwich Yarn Co., 22 Beav. 143, 168; Troup's Case, 29 Beav. 353; In re Beulah Park Estate, L. R. 15 Eq. 43; 1 Lindley Partnership, 390.

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When the money has been paid in as capital, or where there is an express agreement between the parties that interest is not to be allowed or charged, this rule, of course, has no application. So the plaintiff's right to the item of interest must depend upon the fact that the money was a loan to the firm and not a contribution to capital." A partner should be charged with interest on money borrowed from the firm.[68] The Uniform Partnership Act provides: "A partner shall receive interest on the capital contributed by him only from the date when repayment should be made,"[69] and "a partner who, in aid of the partnership, makes any payment or advance beyond the amount of capital which he agreed to contribute, shall be paid interest from the date of the payment or advance."[70]

§ 669. Lien for advances or balances.—A partner has an equitable lien on firm assets, after dissolution, for the payment of advances or balances due to him, after paying firm debts.[71] The court said, in an early Indiana case:[72] "The only question before

[68] Ferguson v. Cripps, 87 Conn. 241, 87 Atl. 792; McCall v. Moss, 112 Ill. 493; Atherton v. Cochran, 9 S. W. 519, 11 S. W. 301, 11 Ky. L. 185. See Kennedy v. Hill, 89 S. Car. 462, 71 S. E. 974; Eng. Partn. Act (1890), § 24 (3).

[69] Uniform Partnership Act, § 18 (d).

[70] Uniform Partnership Act, § 18 (c).

[71] Hoxie v. Carr, 1 Sumn. (U. S.) 173, Fed. Cas. No. 6802; Marnet Oil &c. Co. v. Staley, 218 Fed. 45, 133 C. C. A. 108; Henderson v. Ries, 108 Fed. 709, 47 C. C. A. 625; Donelson v. Posey, 13 Ala. 752; Gray v. Palmer, 9 Cal. 616; Roberts v. McCarty, 9 Ind. 16, 68 Am. Dec. 604; Pierce v. Wilson, 2 Iowa 20; Burk v. Burk (Ky.), 128 S. W. 315; Conwell v. Sandidge, 8 Dana (Ky.) 273; Hodges v. Holeman, 1 Dana (Ky.) 50; Dilworth v. Mayfield, 36 Miss. 40; Standish v. Babcock, 52 N. J. Eq. 628, 29 Atl. 327 (revd. on other grounds, 53 N. J. Eq. 376, 33 Atl. 385, 30 L. R. A. 604, 51 Am. St. 633); Hooley v. Gieve, 9 Abb. N. Cas. 8, 9 Daly (N. Y.) 104 (affd. 82 N. Y. 625); Wade v. Rusher, 4 Bosw. (N. Y.) 537; Frith v. Lawrence, 1 Paige (N. Y.) 434; Hefner v. Hefner, 26 S. Dak. 74, 127 N. W. 634; Betts v. Letcher, 1 S. Dak. 182, 46 N. W. 193; Williams v. Love, 2 Head (Tenn.) 80, 73 Am. Dec. 191; Ex parte Taylor, 12 Ch. D. 366, 41 L. T. Rep. (N. S.) 6, 28 Wkly. Rep. 205; Ex parte Delhasse, 7 Ch. Div. 511, 38 L. T. Rep. (N. S.) 106, 26 Wkly. Rep. 338 (affg. 37 L. T. Rep. (N. S.) 440); Ex parte Macarthur, 40 L. J. Bankr. 86, 19 Wkly. Rep. 821.

[72] Roberts v. McCarty, 9 Ind. 16, 68 Am. Dec. 604.

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us is—Was the mill property partnership stock? If it was, Roberts for the balance due on settlement with his copartner has a right to the lien." So has a partner who is a creditor of the firm a lien on the share of a partner who is a debtor, for whatever is due him on claims connected with the partnership,[73] but no lien for claims outside the partnership relation.[74] Such lien may be waived or lost by conduct.[75]

§ 670. Apportionment of losses.—If there is no contrary agreement,[76] losses are to be borne by the partners in the same proportion as they share profits,[77] prima facie in equal propor-

[73] Marnet Oil &c. Co. v. Staley, 218 Fed. 45, 133 C. C. A. 108; Warren v. Taylor, 60 Ala. 218; Mack v. Woodruff, 87 Ill. 570; Karthaus v. Owings, 4 Harr. & J. (Md.) 263; Brandt v. Edwards, 91 Minn. 505, 98 N. W. 647; Fish v. Thompson, 68 Vt. 273, 35 Atl. 174; Mycock v. Beatson, 13 Ch. D. 384, 49 L. J. Ch. 127; Payne v. Hornby, 25 Beav. 280, 53 Eng. Reprint 643; Cal. Civ. Code, § 2405; N. Dak. Civ. Code, § 4377; Eng. Partn. Act (1890), § 41.

[74] Nichol v. Stewart, 36 Ark. 612; Moffatt v. Thomson, 5 Rich. Eq. (S. Car.) 155, 57 Am. Dec. 737.

[75] Robertson v. Baker, 11 Fla. 192; Kemmerer v. Kemmerer, 85 Iowa 193, 52 N. W. 194; Wilhite's Admr. v. Boulware, 88 Ky. 169, 10 S. W. 629, 11 Ky. L. 59; Wishek v. Hammond, 10 N. Dak. 72, 84 N. W. 587. Compare Brewer v. Johnson, 87 Ark. 641, 112 S. W. 364.

[76] Huger v. Cunningham, 126 Ga. 684, 56 S. E. 64; Taylor v. Coffing, 18 Ill. 422; Baker v. Baltimore Safe Deposit &c. Co., 90 Md. 744, 45 Atl. 1028, 78 Am. St. 463; Woelfel v. Thompson, 173 Mass. 301, 53 N. E. 819; Jones v. Butler, 87 N. Y. 613 (affg. 23 Hun (N. Y.) 367); Ex parte Barber, L. R. 5 Ch. 687, 23 L. T. Rep. (N. S.) 230; Wood v. Scoles, L. R. 1 Ch. 369, 12 Jur. (N. S.) 555; In re Aldridge [1894], 2 Ch. 97, 63 L. J. Ch. 465; Gillan v. Morrison, 1 DeG. & Sm. 421, 11 Jur. 861.

[77] Hellebush v. Coughlin, 37 Fed. 294; Houston v. Polk, 124 Ga. 103, 52 S. E. 83; Taft v. Schwamb, 80 Ill. 289; Bradbury v. Smith, 21 Maine 117; Julliard v. Orem, 70 Md. 465, 17 Atl. 333; Craig v. Warner, 216 Mass. 386, 103 N. E. 1032; Whitcomb v. Converse, 119 Mass. 38, 20 Am. Rep. 311; Raymond v. Putnam, 44 N. H. 160; Shearman v. Cameron, 76 N. J. Eq. 426, 74 Atl. 979; Sandias v. Mustacchi, 153 App. Div. 810, 138 N. Y. S. 875; Gausevoort v. Kennedy, 30 Barb. (N. Y.) 279; Hasbrouck v. Childs, 3 Bosw. (N. Y.) 105; Emerick v. Moir, 124 Pa. St. 498, 17 Atl. 1; In re Hall, 32 R. I. 424, 79 Atl. 966; Shea v. Donahue, 15 Lea (Tenn.) 160, 54 Am. Rep. 407; Smiley v. Smiley, 112 Va. 490, 71 S. E. 532, Ann. Cas. 1913 B, 1159n; Wipperman v. Stacy, 80 Wis. 345, 50 N. W. 336; In re Albion L. Assur. Soc., 16 Ch. D. 83; Nowell v. Nowell, L. R. 7 Eq. 538; Collins v. Jackson, 31 Beav. 645; 54

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tions[78] even though they have not contributed equally to capital, thus if nothing to the contrary appears, losses of capital must be shared equally.[79] The Uniform Partnership Act provides that a partner must contribute toward losses, whether of capital or otherwise, according to his share in the profits, in the absence of contrary agreement.[80] It was said in a leading case:[81] "In the absence of controlling agreement, partners must bear the losses in the same proportion as the profits of the partnership, even if one contributes the whole capital, and the other nothing but his labor or services.[82] Whether a loss of capital is a partnership loss, to be borne by all the partners, depends upon the nature and extent of the contract of partnership. If, as is not unfrequently the case in a partnership for a single adventure, the mere use of the capital is contributed by one partner, and the partnership is in the profits and losses only, the capital remains the property of the individual partner to whom it originally belonged, any loss or destruction of it falls upon him as owner, and, as it never becomes the property of the partnership, the partnership owes him nothing in consideration thereof.[83] But where, as is usual in an ordinary mercantile partnership, a partnership is created not merely in profits and losses, but in the property itself, the property is transferred from the original owners to the partnership, and becomes the joint property of the latter; a corresponding obligation arises on the part of the partnership to pay the value thereof to the individuals who originally contributed it; such payment can not indeed be demanded during the continuance of the partnership, nor are the contributors, in the absence of agreement or usage, entitled to interest; but if the assets of the part-

Eng. Reprint 1289; Foster v. Chaplin, 19 Grant. Ch. (U. C.) 251; Eng. Partnership Act (1890), § 44 (a).

[78] Buie v. Kennedy, 164 N. Car. 290, 80 S. E. 445.

[79] Smiley v. Smiley, 112 Va. 490, 71 S. E. 532, Ann. Cas. 1913 B, 1159n. Citing Lindley Partnership, vol. 2, p. 676.

[80] Uniform Partnership Act, § 18 (a).

[81] Whitcomb v. Converse, 119 Mass. 38, 20 Am. Rep. 311.

[82] Citing 3 Kent Com. 28, 29.

[83] Story Partnership, §§ 27, 29; Heran v. Hall, 1 B. Mon. 159, 35 Am. Dec. 178.

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nership, upon a final settlement, are insufficient to satisfy this obligation all the partners must bear it in the same proportion as other debts of the partnership." A partner who has caused losses by his gross negligence, or breach of contract, must bear them alone.[84] Where one partner has furnished the labor, and another the money it is often held that the one furnishing labor is not compelled to contribute to the losses of the one furnishing money.[85] Other courts have, under some circumstances, compelled the partner who was to furnish services merely, to contribute to a loss of capital, as where the loss was caused by fire.[86] And it is held that where there is a partnership in property and not merely in profits and loss, the depreciation caused in apparatus contributed by one partner as his share of the capital, must be borne by the partnership, not by the partner alone.[87] Where the partners entered into a dissolution agreement, by which one of them assumed all liabilities, estimating losses at six hundred dollars, actual losses of five thousand dollars were so much larger than contemplated that the contract will not be enforced, being the result of mutual mistake.[88]

§ 671. **Repayment of capital.**—After liabilities to third persons and firm debts to partners are paid, each partner is entitled to the repayment of the capital contributed by him,[89] or if

[84] Bonis v. Louvrier, 8 La. Ann. 4; Tygart v. Wilson, 39 App. Div. 58, 56 N. Y. S. 827.

[85] Meadows v. Mocquot, 110 Ky. 220, 61 S. W. 28, 22 Ky. L. 1646; Rau v. Boyle, 5 Bush (Ky.) 253; Heran v. Hall, 1 B. Mon. (Ky.) 159, 35 Am. Dec. 178; Everly v. Durborrow, 8 Phila. (Pa.) 93.

[86] Gore v. Vines, 72 W. Va. 783, 79 S. E. 820.

[87] In re Hall, 32 R. I. 424, 79 Atl. 966.

[88] Taylor v. Wrather, 155 Ky. 25, 159 S. W. 662.

[89] Bullock v. Ashley, 90 Ill. 102; Jackson v. Crapp, 32 Ind. 422; Capital Food Co. v. Globe Coal Co., 142 Iowa 134, 120 N. W. 704; Frederick v. Cooper, 3 Iowa 171; Johnson v. Jackson, 130 Ky. 751, 114 S. W. 260, 17 Ann. Cas. 699; Thomas v. Winchester Bank, 105 Ky. 694, 49 S. W. 539, 20 Ky. L. 1502; Sanders v. Herndon, 110 S. W. 862, 33 Ky. L. 669; Frigerio v. Crottes, 20 La. Ann. 351; Whitcomb v. Converse, 119 Mass. 38, 20 Am. Rep. 311; Treacy v. Power, 112 Minn. 226, 127 N. W. 936; Jones v. Butler, 87 N. Y. 613 (affg. 23 Hun (N. Y.) 367); Neudecker v. Kohlberg, 3 Daly (N. Y.) 407; Buie v. Kennedy, 164 N. Car. 290, 80 S. E. 445; Adams v. Hubbard, 221 Pa.

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the assets are insufficient to do this, then to the repayment of his ratable proportion of capital.[90] This mode of distributing capital may be changed by agreement,[91] and a partner may lose his

511, 70 Atl. 835; Rowland v. Miller, 7 Phila. (Pa.) 362; In re Hall, 32 R. I. 424, 79 Atl. 966; Kennedy v. Hill, 89 S. Car. 462, 71 S. E. 974; Wilson v. Wilson, 74 S. Car. 30, 54 S. E. 227; Johnston v. Ballard, 83 Tex. 486, 18 S. W. 686; Smiley v. Smiley, 112 Va. 490, 71 S. E. 532; Ann. Cas. 1913 B, 1159; Gore v. Vines, 72 W. Va. 783, 79 S. E. 820; Fouse v. Shelly, 64 W. Va. 425, 63 S. E. 208; Hall v. Antrobus, 44 Nova Scotia 96; Cameron v. Peters, 8 Ont. W. R. 359.

[90] Capital Food Co. v. Globe Coal Co., 142 Iowa 134, 120 N. W. 704; Hasbrouck v. Childs, 3 Bosw. (N. Y.) 105; In re Hall, 32 R. I. 424, 79 Atl. 966; Kennedy v. Hill, 89 S. Car. 462, 71 S. E. 974; Eng. Partn. Act (1890), § 40 (b) 3. Compare Brewer v. Johnson, 87 Ark. 641, 112 S. W. 364. See cases cited in preceding note.

[91] Groth v. Kersting, 23 Colo. 213, 47 Pac. 393; Scutt v. Robertson, 127 Ill. 135, 19 N. E. 851, 17 N. E. 14 (1888); Burger v. Robinson, 81 Misc. 678, 143 N. Y. S. 530; Wood v. Scoles, L. R. 1 Ch. 369, 12 Jur. (N. S.) 555, 35 L. J. Ch. 547; Lawton Saw Co. v. Machum, 2 N. Brunsw. Eq. 191. Although it is the general rule, that in the absence of any agreement, express or implied, partners share profits and losses of the business equally, who have not contributed equally to the partnership capital, this does not apply to the division of partnership capital; and partners may by agreement provide for an equal share in the capital, when their contributions thereto are unequal. Smiley v. Smiley's Admx., 112 Va. 490, 71 S. E. 532, Ann. Cas. 1913 B, 1159n. A partnership contract provided that the capital should be $105,000; that plaintiffs together had contributed $25,000, that defendant had contributed $80,000, and it was error for the court on dissolution and accounting to take the value of the assets at the time of accounting as shown by an inventory instead of the amount stated in the contract as the original capital as a basis for distribution. Kennedy v. Hill, 89 S. Car. 462, 71 S. E. 974. Where a partnership contract provided that upon final accounting one partner should receive from the copartnership moneys the sum of $1,000 "in excess of his one-half interest in said copartnership assets," such sum must be subtracted from the other partner's half of the assets and added to the half of his copartner. Hetzel v. Fadner, 167 Ill. App. 92. On dissolution of a partnership, a partner took possession of a firm asset, treated it as his own, and carried on the business in his own name, and on his account. The excluded partner who had a right at his election to demand either the actual profits made by the partner continuing his business or his share of the capital thus employed with interest, might, where at the time of the accounting the amount due the retiring partner is less than the value of the firm assets at the dissolution, charge the continuing partner with the larger

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right to a return of capital by misconduct, or by contract.[92] Where a partnership sold its plant and assets to a corporation, and received corporate stock distributed among the constituent companies of the corporation in proportion to the value of the plant and in part in proportion to its earnings, the court held that the stock issued on the basis of earnings should go two-thirds to one partner, the remainder to the other, in the proportions in which they had contributed capital.[93]

§ 672. Partition of assets.—Partition of the firm property may be had by the partners only in case the firm creditors are not harmed.[94] In the absence of an express or implied agreement to the contrary,[95] the presumption is that partners are to share equally.[96] A partner's indebtedness to the firm must either be paid by him, or deducted from his share, in ascertaining what

amount. Treacy v. Powers, 112 Minn. 226, 127 N. W. 936.

[92] Kibby v. Kimball, 63 Iowa 665, 19 N. W. 825; Clink v. Carpenter, 122 Mich. 681, 81 N. W. 932; Neudecker v. Kohlberg, 3 Daly (N. Y.) 407; Shea v. Donahue, 15 Lea (Tenn.) 160, 54 Am. Rep. 407; Escallier v. Baines, 40 Wash. 176, 82 Pac. 181. See Smiley v. Smiley, 112 Va. 490, 71 S. E. 532, Ann. Cas. 1913 B, 1159n; Thomas v. Winchester Bank, 105 Ky. 694, 49 S. W. 539, 20 Ky. L. 1502.

[93] Whittle v. Davie (Va.), 82 S. E. 724.

[94] Donelson v. Posey, 13 Ala. 752; Harper v. Lamping, 33 Cal. 641; Commonwealth v. Bracken, 32 S. W. 609, 17 Ky. L. 785; Turner v. Turner, 98 Md. 22, 55 Atl. 1023; Leach v. Leach, 18 Pick. (Mass.) 68; Miller v. Hale, 96 Mo. App. 427, 70 S. W. 258; Krigbaum v. Vindquest, 10 Nebr. 435, 6 N. W. 631; Ratzer v. Ratzer, 28 N. J. Eq. 136; Jones v. Jones, 36 N. Car. 332; Christman v. Baurichter, 10 Phila. 115, 31 Leg. Int. (Pa.) 68; McAlister v. Montgomery, 3 Hayw. (Tenn.) 94; McCormick v. Bailey, 17 W. Va. 585; Nelson v. Bealby, 30 Beav. 472, 5 L. T. Rep. (N. S.) 599.

[95] Chouteau v. Barlow, 110 U. S. 238, 28 L. ed. 132, 3 Sup. Ct. 620; Adams v. Gordon, 98 Ill. 598; Klotz v. Macready, 39 La. Ann. 638, 2 So. 203; Brandt v. Edwards, 91 Minn. 505, 98 N. W. 647; Krigbaum v. Vindquest, 10 Nebr. 435, 6 N. W. 631; Molineaux v. Raynolds, 54 N. J. Eq. 559, 35 Atl. 536; Parks v. Comstock, 59 Barb. (N. Y.) 16; McCullough v. Barr, 145 Pa. St. 459, 22 Atl. 962; Wilson v. Wilson, 74 S. Car. 30, 54 S. E. 227. See Steinberg v. Eagan, 234 Pa. 291, 83 Atl. 272.

[96] Sloan v. Wilson, 117 Ala. 583, 23 So. 145; McKee v. Cowles, 161 Ill. 201, 43 N. E. 785 (affg. 59 Ill. App. 28); Curry v. Burnett, 36 Ind. 102; Proper v. Lambert (Iowa), 95 N. W. 251 (1903); Leach v. Leach, 18 Pick. (Mass.) 68; Langlois v. Du-

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is due him.[97] Real estate held as partnership property, if not needed to pay firm debts, may be partitioned by the partners, or by judicial decree,[98] except where it has been by agreement converted into out and out personalty.[99] As said in one case,[1] "in this country the land is held to be personal assets so far only as it may be needed to pay firm creditors."[1a] Out of this equity of each partner to have the firm property applied to the payment of firm debts in order that he may be discharged from personal liability, has emerged the rule that the partition of the real property of a firm will not be decreed so long as debts of the partnership remain unliquidated.[2] By the rule laid down in these cases, the only method by which a partner, under such conditions, can compel a division of the firm property, is by a bill to administer and settle the partnership affairs. It is apparent, however, that inasmuch as the ground for refusing partition is that part-

bray, 17 Quebec Super. Ct. 328. See Lesamis v. Greenberg, 225 Fed. 449.

[97] Harrah v. Dyer, 180 Ind. 229, 102 N. E. 14; Corbin v. Henry, 36 Ind. App. 184, 74 N. E. 1096; Greenwell v. Negley, 101 S. W. 961, 31 Ky. L. Rep. 144; Leserman v. Bernheimer, 113 N. Y. 39, 20 N. E. 869; Lyons v. Lyons, 207 Pa. St. 7, 56 Atl. 54, 99 Am. St. 779; Binney v. Mutrie, 12 App. Cas. 160, 36 Wkly. Rep. 129; Ross v. White [1894], 3 Ch. 326, 64 L. J. Ch. 48.

[98] Holton v. Guinn, 65 Fed. 450; Carpenter v. Hathaway, 87 Cal. 434, 25 Pac. 549; Cooper v. Frederick, 4 G. Greene (Iowa) 403; Chambers v. Chambers, 11 S. W. 469, 11 Ky. L. 25; Comstock v. McDonald, 126 Mich. 142, 85 N. W. 579; Way v. Stebbins, 47 Mich. 296, 11 N. W. 166; Collins v. Warren, 29 Mo. 236; Pitt v. Moore, 99 N. Car. 85, 5 S. E. 389, 6 Am. St. 489; Burnside v. Savier, 6 Ore. 154.

[99] Hiscock v. Jaycox, Fed. Cas. No. 6531, 12 Nat. Bankr. Reg. 507; Davis v. Smith, 82 Ala. 198, 2 So. 897; Nicoll v. Ogden, 29 Ill. 323, 81 Am. Dec. 311; Patrick v. Patrick, 71 N. J. Eq. 347, 63 Atl. 848; Molineaux v. Raynolds, 54 N. J. Eq. 559, 35 Atl. 536; Maddock v. Astbury, 32 N. J. Eq. 181; Darrow v. Calkins, 154 N. Y. 503, 49 N. E. 61, 48 L. R. A. 299, 61 Am St. 637; Barney v. Pike, 94 App. Div. 199, 87 N. Y. S. 1038; Ludlow v. Cooper, 4 Ohio St. 1; In re Leaf's Appeal, 105 Pa. St. 505; Davis v. Christian, 15 Grat. (Va.) 11. See sections in preceding chapter on status of partnership real estate after death of partner.

[1] Molineaux v. Raynolds, 54 N. J. Eq. 559, 35 Atl. 536.

[1a] Freem. Partnership, ¶ 118, citing Bank of the Metropolis v. Sprague, 5 C. E. Gr. (N. J.) 13.

[2] Citing Pennybacker v. Leary, 65 Iowa 220, 21 N. W. 575; Mendenhall v. Benbow, 84 N. Car. 646; Kruschke v. Stefan, 83 Wis. 373, 53 N. W. 679; Freem. Partnership, ¶ 443.

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ners may be protected from future calls to pay firm debts, therefore, if it should be made to appear that the property involved in the application for partition will not be needed to meet such obligations, the objection to the distribution of the property disappears."

§ 673. Division of profits.—The general rule is that after all debts of the firm have been paid, and its liabilities to partners for advances and capital, the balance is considered firm profits, to be divided among the partners.[3] It seems that any change in the value of the capital, such as an increase in the value of the plant,[4] or deterioration caused by use,[5] should be considered in apportioning profits. By agreement a portion of profits may be added to the capital, or distributed at intervals while the firm

[3] Coward v. Clanton, 79 Cal. 23, 21 Pac. 359; Lacon v. Davenport, 16 Conn. 331; Norris v. Rogers, 107 Ill. 148; Smith v. Hazelton, 34 Ind. 481; Clift v. Stockdon, 4 Litt. (Ky.) 215; Washburn v. Goodman, 17 Pick. (Mass.) 519; Oppe v. Webensdorfer, 43 Hun 640, 7 N. Y. St. 283; Gill v. Geyer, 15 Ohio St. 399; Woldenberg v. Berg, 45 Ore. 291, 77 Pac. 873; McClusky v. Klosterman, 20 Ore. 108, 25 Pac. 366, 10 L. R. A. 785n; Smith v. Smith, 18 R. I. 722, 29 Atl. 584, 30 Atl. 602; Russell v. Nail, 79 Tex. 664, 15 S. W. 635; Knauss v. Cahoon, 7 Utah 182, 26 Pac. 295; Brigham v. Dana, 29 Vt. 1; Dinham v. Bradford, L. R. 5 Ch. 519; Badham v. Williams, 86 L. T. Rep. (N. S.) 191; Eng. Partnership Act (1890), § 44. See Grier v. Strother, 153 Mo. App. 292, 133 S. W. 404; Jackson v. Jackson, 224 Fed. 888; Buie v. Kennedy, 164 N. Car. 290, 80 S. E. 445. "Profits" are the excess of the returns over advances made by the partners, and the term "profits" is synonymous with "net profits," while "losses" are the excess of advances over returns; therefore all profits are necessarily net profits, though the term "gross profits" is sometimes inaccurately used to designate the returns. Buie v. Kennedy, 164 N. Car. 290, 80 S. E. 445. "When persons engage as partners in buying and selling stocks, bonds, and other securities for their mutual profit, the gains made by purchases and sales are profits of the partnership divisible as such among those entitled to the profits of the partnership." Williams v. Inhabitants of Milton, 215 Mass. 1, 102 N. E. 355.

[4] Woldenberg v. Berg, 45 Ore. 291, 77 Pac. 873.

[5] The amount by which the capital of a firm which consisted of turpentine trees, has been reduced in value by use in the business, as by the sale of the manufactured product, should be deducted from the gross returns in determining the profits. Buie v. Kennedy, 164 N. Car. 290, 80 S. E. 445.

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is going.[6] On this point it was said in a New Jersey case:[7] "The contention of the complainant is that this real estate represents accumulated profits, and therefore should be divided in the proportions to which the several partners were entitled to share in profits. The contention of the defendants is that this real estate represents capital, and it should be divided in proportion to each partner's contribution of capital. Inasmuch as the partners, under the different partnership agreements, were entitled to share in profits in proportions differing from his proportionate contribution of capital, it follows that by the adoption of the one or the other of these theories the interest of the complainant in the firm property is differently affected. As has been already displayed, these partners had transacted partnership business, under successive agreements, from 1867. Each agreement set out the amount of capital which each partner had contributed and prescribed the proportion of profits to which each partner was to be entitled during the term of the partnership. He was also to have the right to draw interest upon his capital. Now, some partners drew out all of their interest and all of their profits; others let a portion of their profits or a portion of their interest remain in the business. By the apparent acquiescence of all the partners, the balance of these profits or interest remaining at the end of each year undrawn was added to the amount of the capital of those of the partners who saw fit to permit it to remain in the business. By reason of the unequal additions to the capital from year to year, the proportions of capital respectively contributed constantly shifted, and the total amount of capital contributed by all increased. Now, the theory of the complainant is that the original amount of firm property was increased by the employment of the profits which were permitted to remain in the business, in improving and purchasing property. It is insisted that by the sale of the personal property

[6] *O'Conner* v. Stark, 2 Cal. 153; *Safe Deposit &c. Co.* v. Turner, 98 *Md. 22, 55* Atl. 1023; In re Wood, 34 *Ont. L. 278,* 8 Ont. W. N. 583; Kennedy v. Hill, 89 S. Car. 462, 71 S. E. 974.

[7] Molineaux v. Raynolds, 54 N. J. Eq. 559, 35 Atl. 536.

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by the old firm to the new firm in 1889, the members of the old firm were paid for all the property which represented the product of the original capital, and that what remained is to be regarded as the product of the profits, and should therefore be divided as such. Now, it seems to be entirely clear that the end of each year the net profits of the business were divided between the respective partners, in the proportions in which profits were to be divided by the terms of the agreement. It is clear that when these profits were calculated and divided according to the terms of the agreement, and the share of each partner was put to his credit, then, as between the partners, these profits ceased to be assets of the firm and became debts due from the firm to each member of the firm. The sum set apart to each partner at the end of each year was at the disposal of the partner as so much cash put to his credit. He could draw it out and use it as he chose. If he chose to invest it in the business, it was to be regarded as any other money which he saw fit to so invest. It became a part of the capital or it became a loan, just as he and the partners agreed. That they agreed to regard these sums as additions to the capital appears beyond all question." The firm profits include profits made by a receiver, by a surviving partner or liquidating partner after dissolution, and by a partner who has excluded wrongfully his partner.[8] If a partner becomes the owner of all the firm assets, profits made by him are not firm profits.[9]

[8] Osment v. McElrath, 68 Cal. 466, 9 Pac. 731, 58 Am. Rep. 17; Kimball v. Lincoln, 5 Ill. App. 316; Varnum v. Winslow, 106 Iowa 287, 76 N. W. 708; Oteri v. Oteri, 37 La. Ann. 74; Freeman v. Freeman, 142 Mass. 98, 7 N. E. 710; Hughes v. Love, 136 Mich. 169, 98 N. W. 977; 138 Mich. 281, 101 N. W. 536; Berry v. Folkes, 60 Miss. 576; Hartman v. Woehr, 18 N. J. Eq. 383; Tolan v. Carr, 12 Daly (N. Y.) 520; Pitt v. Moore, 99 N. Car. 85, 5 S. E. 389, 6 Am. St. 489; Durbin v. Barber, 14 Ohio 311; Smith v. Ervin, 3 Pa. Dist. 485; Cole v. Moxley, 12 W. Va. 730; Lambert v. Lambert, L. R. 16 Eq. 320, 43 L. J. Ch. 106; Cook v. Collingridge, Jac. 607, 1 L. J. Ch. (O. S.) 74. Compare Whitesides v. Lafferty, 3 Humph. (Tenn.) 150. Contra: McMahon v. McClernan, 10 W. Va. 419; Hampton v. Wooley (Tex. Civ. App.), 136 S. W. 1140.

[9] Patterson v. Kellogg, 53 Conn. 38, 22 Atl. 1096; Reybold v. Dodd, 1 Harr. 401 (Del.), 26 Am. Dec. 401; Phillips v. Reeder, 18 N. J. Eq. 95;

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§ 674. Proportionate share of each partner in profits.—Every partner is entitled to share in firm profits,[10] though this right may be forfeited, or contracted away.[11] Unless there is an express or implied agreement to the contrary,[12] each partner shares equally in profits.[13] Judge Story very pertinently

White v. Reed, 124 N. Y. 468, 26 N. E. 1037; White v. White, 55 N. Y. Super. Ct. 417, 14 N. Y. St. 738. Plumly's Appeal, 1 Monag. (Pa.) 177, 16 Atl. 728 (1889). Compare Gresham v. Harcourt, 93 Tex. 149, 53 S. W. 1019 (revg. [Tex. Civ. App.] 50 S. W. 1058).

[10] Beck v. Thompson, 22 Nev. 109, 36 Pac. 562; Hartman v. Woehr, 18 N. J. Eq. 383; King v. Leighton, 100 N. Y. 386, 3 N. E. 594; Wight v. Wood, 85 N. Y. 402; Thomas v. Rogers, 44 Hun 624, 8 N. Y. St. 284 (affd. 120 N. Y. 637, 24 N. E. 1096); Garrett v. Bradford, 28 Gratt. (Va.) 609; Singer v. Heller, 40 Wis. 544.

[11] White v. Reed, 124 N. Y. 468, 26 N. E. 1037; Westwood v. Cole, 66 Misc. 53, 120 N. Y. S. 884; Jenkins v. Jenkins, 66 Ore. 12, 132 Pac. 542; Yoos v. Doyle, 4 Lack. Leg. N. (Pa.) 128; Taylor v. Hutchinson, 25 Grat. (Va.) 536, 18 Am. Rep. 699.

[12] Moore v. Trieber, 31 Ark. 113; Little v. Caldwell, 112 Cal. 27, 44 Pac. 340; Fleischmann v. Gottschalk, 70 Md. 523, 17 Atl. 384; In re Laney, 119 N. Y. 607, 23 N. E. 1143 (affg. 50 Hun 15, 2 N. Y. S. 443, 18 N. Y. St. 463); Davenport v. Morrissey, 14 N. Y. App. Div. 586, 44 N. Y. S. 29 (affd. 154 N. Y. 782, 49 N. E. 1095); Binney v. Mutrie, 12 App. Cas. 160, 36 Wkly. Rep. 129; Straker v. Wilson, L. R. 6 Ch. 503, 40 L. J. Ch. 630. See Moore v. Rawson, 199 Mass. 493, 85 N. E. 586; Hutchins v. Page, 204 Mass. 284, 90 N. E. 565, 134 Am. St. 565; Jackson v. Jackson, 224 Fed. 888.

[13] Kimberly v. Arms, 129 U. S. 512, 32 L. ed. 764, 9 Sup. Ct. 355; Pearce v. Ham, 113 U. S. 585, 28 L. ed. 1067, 5 Sup. Ct. 676; Foster v. Goddard, 1 Black (U. S.) 506, 17 L. ed. 228; Van Tine v. Hilands, 142 Fed. 613; Duden v. Maloy, 63 Fed. 183, 11 C. C. A. 119; Dumont v. Ruepprecht, 38 Ala. 175; Desha v. Smith, 20 Ala. 747; Donelson v. Posey, 13 Ala. 752; Turnipseed v. Goodwin, 9 Ala. 372; Gorham v. Heiman, 90 Cal. 346, 27 Pac. 289; Carpenter v. Hathaway, 87 Cal. 434, 25 Pac. 549; Griggs v. Clark, 23 Cal. 427; Pond v. Clark, 24 Conn. 370; Plunkett v. Dillon, 4 Houst. (Del.) 338; Sanderson v. Sanderson, 20 Fla. 292; Parnell v. Robinson, 58 Ga. 26; Van Housen v. Copeland, 180 Ill. 74, 54 N. E. 169 (affg. 79 Ill. App. 139); Burgess v. Badger, 124 Ill. 288, 14 N. E. 850; Helmer v. Yetzer, 92 Iowa 627, 61 N. W. 206; Norman v. Conn, 20 Kans. 159; Honore v. Colmesnil, 1 J. J. Marsh. (Ky.) 506; Stuart v. Harmon, 72 S. W. 365, 24 Ky. L. 1829, 75 S. W. 257, 25 Ky. L. 439; Avritt v. Russell, 58 S. W. 811, 22 Ky. L. 752; Atherton v. Cochran, 9 S. W. 519, 11 S. W. 301, 11 Ky. L. 185; Wolfe v. Gilmer, 7 La. Ann. 583; Zacharie v. Blandin, 6 La. 193; Fleischmann v. Gottschalk, 70 Md. 523, 17 Atl. 384; Welsh v. Canfield, 60 Md. 469; Harris v. Carter, 147 Mass. 313, 17 N. E. 649; Meserve v. Andrews, 106 Mass. 419; Fuller

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says:[14] "In the absence, however, of all precise stipulations between the partners, as to their respective shares in the profits and losses, and in the absence of all other controlling evidence and circumstances, the rule of the common law is, that they are to share equally of both; for in such a case equality would seem to be equity.[15] And the circumstance, that each partner has brought an unequal amount of capital into the common stock, or that one or more has brought in the whole capital, and the others have only brought industry, skill, and experience, would not seem to furnish any substantial or decisive ground of difference, as to the distribution. On the contrary, the very silence of the partners, as to any particular stipulation, might seem fairly to import, either, that there was not, all things considered, any real inequality in the benefits to the partnership in the case, or that the matter was waived upon grounds of good-will, or affection, or liberality, or expediency."[16] There is some confusion in the authorities in

v. Miller, 105 Mass. 103; Snyder v. O'Beirne, 132 Mich. 340, 93 N. W. 872; Houghton v. Bradley, 113 Mich. 599, 71 N. W. 1112; Wingarden v. Verhage, 68 Mich. 14, 35 N. W. 801; Clark v. Clark (Miss.), 17 So. 510; Randle v. Richardson, 53 Miss. 176; Miller v. Hale, 96 Mo. App. 427, 70 S. W. 258; Murphy v. Patterson, 24 Mont. 575, 63 Pac. 375; Warren v. Raben, 33 Nebr. 380, 50 N. W. 257; Ratzer v. Ratzer, 28 N. J. Eq. 136; Evans v. Warner, 20 App. Div. 230, 47 N. Y. S. 16; Caldwell v. Leiber, 7 Paige (N. Y.) 483; Jones v. Jones, 36 N. Car. 332; Taylor v. Taylor, 6 N. Car. 70; Gill v. Geyer, 15 Ohio St. 399; Keys v. Baldwin, 10 Ohio Dec. (Reprint) 268, 19 Cinc. L. Bul. 375; Frazer v. Linton, 183 Pa. St. 186, 38 Atl. 589; Fulmer's Appeal, 90 Pa. St. 143; McIntire's Appeal, 118 Pa. St. 421, 11 Atl. 784; Broadfoot v. Fraser, 73 Vt. 313, 50 Atl. 1054; Towner v. Lane, 9 Leigh (Va.) 262; Brown v. Dale, 9 Ch. Div. 78, 27 Wkly. Rep. 149; Collins v. Jackson, 31 Beav. 645, 54 Eng. Reprint 1289; Robinson v. Anderson, 20 Beav. 98, 52 Eng. Reprint 539 (affd. 7 DeG., M. & G. 239, 56 Eng. Ch. 239, 44 Eng. Reprint 94); Robley v. Brooke, 7 Bligh (N. S.) 90, 5 Eng. Reprint 705; Webster v. Bray, 7 Hare 159, 27 Eng. Ch. 159, 68 Eng. Reprint 65; Stewart v. Forbes, 13 Jur. 523, 1 Macn. & G. 137, 47 Eng. Ch. 137; Eng. Partnership Act (1890), § 24 (1).

[14] Story Partnership (5th ed.), § 24.

[15] Citing Watson Partnership, ch. 1 (2d ed.), pp. 59, 60; Collyer Partn. B. 1 (2d ed.), ch. 1, § 2, pp. 105, 106; 3 Kent. Comm. Lect. 43 (4th ed.), p. 28; Donelson v. Posey, 13 Ala. 752; Roach v. Perry, 16 Ill. 37; Gould v. Gould, 6 Wend. (N. Y.) 263.

[16] Citing Collyer Partnership, B. 2 (2nd ed.), ch. 1, § 2, pp. 105, 107; 3 Kent. Comm. Lect. 43 (4th ed.), p. 28; Watson Partnership (2nd ed.),

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regard to accounting for profits in an illegal partnership.[17] An innocent partner may recover his share of firm profits, though they have been made greater because his copartner cheated firm customers.[18]

§ 675. Private settlement.—The partners may settle firm affairs by a private accounting, or even without accounting,[19] if there is no fraud on creditors.[20] To make such accounting binding, all partners must assent, and all partnership transactions must be included in order to make a final settlement.[21] The courts will enforce such a settlement, if clear and complete,[22] but if the terms and intent of the settlement are not clear, the court will construe all written instruments, and look to the conduct of the parties in order to ascertain what was the real intention of the

ch. 1, pp. 56, 60; Gould v. Gould, 6 Wend. (N. Y.) 263.

[17] McMullen v. Hoffman, 174 U. S. 639, 43 L. ed. 1117, 19 Sup. Ct. 839; Brooks v. Martin, 2 Wall. (U. S.) 70, 17 L. ed. 732; Wann v. Kelly, 5 Fed. 584, 2 McCrary (U. S.) 628; Watson v. Murray, 23 N. J. Eq. 257; Wiggins v. Bisso, 92 Tex. 219, 47 S. W. 637, 71 Am. St. 837; Pfeiffer v. Maltby, 38 Tex. 523; Lane v. Thomas, 37 Tex. 157. See §§ 655, 656, this chapter, on that subject.

[18] Pennington v. Todd, 47 N. J. Eq. 569, 21 Atl. 297, 11 L. R. A. 589, 24 Am. St. 419.

[19] Scheuer v. Berringer, 102 Ala. 216, 14 So. 640; Spratt v. Dwyer (Iowa), 151 N. W. 474; Kolb v. Dubois, 150 Ky. 92, 149 S. W. 1134; Silverman v. Kogut, 143 N. Y. S. 947.

[20] Sage v. Woodin, 66 N. Y. 578; Ex parte Walker, 4 DeG., F. & J. 509, 6 L. T. Rep. (N. S.) 631; Ex parte Mayor, 4 DeG., J. & S. 664, 34 L. J. Bankr. 25; Ex parte Brewster, 22 L. J. Bankr. 62.

[21] Kimberly v. Arms, 129 U. S. 512, 32 L. ed. 764, 9 Sup. Ct. 355; Lamalere v. Caze, 1 Wash. 435, 14 Fed. Cas. No. 8003; Chadsey v. Harrison, 11 Ill. 151; Cooper v. Frederick, 4 G. Greene (Iowa) 403.

[22] Goodenow v. Parkinson, 67 Iowa 95, 24 N. W. 608; Burley v. Brown, 73 Kans. 780, 85 Pac. 527; Kyle v. McKerrall, 52 La. Ann. 1235, 27 So. 667; Dorsey v. Dashiell, 1 Md. 198; Robinson v. Simmons, 156 Mass. 123, 30 N. E. 362; Blakeley v. Le Duc, 22 Minn. 476; Paul v. Edwards, 1 Mo. 30; Cochrane v. Allen, 58 N. H. 250; Warrin v. Warrin, 154 N. Y. S. 458; Bastable v. Carroll, 116 App. Div. 205, 101 N. Y. S. 637; Smith v. Proskey, 177 N. Y. 526, 69 N. E. 1131 (revg. 82 App. Div. 19, 81 N. Y. S. 424, revg. 39 Misc. 385, 79 N. Y. S. 851); Gram v. Cadwell, 5 Cow. (N. Y.) 489; Little v. Stanton, 32 Pa. St. 299; Brigham v. Dana, 29 Vt. 1; Holt v. Holt, 46 W. Va. 397, 35 S. E. 19; Jackson v. Stopherd, 2 Cromp. & M. 361, 3 L. J. Exch. 95; Jackson v. Drake, 37 Can. S. Ct. 315; Ex parte Banks, 1 Newfoundl. 349. See Gaisell v. Johnston, 68 Wash. 470, 123

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partners.[22] The ordinary rules as to the validity of contracts are applicable to contracts of settlement of firm affairs by partners.[24] Such settlement should be supported by a valid consideration.[25] An agreement between the partners for a settlement and dissolution may be annulled or set aside for fraud or mistake.[26] If

Pac. 783; Evans v. Mackey (Ala.), 66 So. 3; Andrews v. Stinson, 254 Ill. 111, 98 N. E. 222, Ann. Cas. 1913 B, 927n (revg. judgment 164 Ill. App. 25); Silverman v. Kogut, 143 N. Y. S. 947; Babcock v. Swartwout, 145 App. Div. 203, 129 N. Y. S. 1042; Spencer v. Bynum (N. Car.), 85 S. E. 216.

[23] Sanford v. Embry, 151 Fed. 977, 81 C. C. A. 167; Shows v. Folmar, 133 Ala. 599, 32 So. 495; Hurlbut v. Phelps, 30 Conn. 42; Beach v. Hotchkiss, 2 Conn. 425; Neal v. Conwell, 115 Ga. 471, 41 S. E. 607; Blalock v. Jackson, 94 Ga. 469, 20 S. E. 346; Thomas v. Gaboury, 80 Ga. 443, 7 S. E. 690; Horne v. Ingraham, 125 Ill. 198, 16 N. E. 868; Muhlhiem v. Foster, 41 Ill. App. 458; Barker v. McClelland, 50 Ind. App. 296, 98 N. E. 300; McDowell v. North, 24 Ind. App. 435, 55 N. E. 789; Donahue v. McCosh, 70 Iowa 733, 30 N. W. 14; Murphy v. Murphy, 45 La. Ann. 433, 12 So. 496; Farnsworth v. Whitney, 74 Maine 370; Trump v. Baltzell, 3 Md. 295; Stoddard v. Wood, 9 Gray (Mass.) 90; In re Judy, 166 Mo. 13, 65 S. W. 993; Martin v. Smith (N. J. Eq.), 13 Atl. 398; Ralph v. Eldridge, 137 N. Y. 525, 33 N. E. 559 (revg. 58 Hun 203, 11 N. Y. S. 840, 34 N. Y. St. 191); Eno v. Diefendorf, 102 N. Y. 720, 7 N. E. 798, 1 Silv. Ct. App. 157; Jarvie v. Arbuckle, 163 App. Div. 199, 148 N. Y. S. 189; Gilliam v. Newland, 37 Okla. 36, 130 Pac. 133; Adams v. Hubbard, 221 Pa. 511, 70 Atl. 835; Seaton v. Shaner, 158 Pa. St. 69, 27 Atl. 871; Schmidt v. Lebby, 11 Rich. Eq. (S. Car.) 329; Babb v. Mosby, 7 Lea (Tenn.) 105; Morris v. Nunn, 79 Tex. 125, 15 S. W. 220; Upton v. Johnston, 84 Wis. 8, 54 N. W. 266; Ex parte Barber, L. R. 5 Ch. 687, 23 L. T. Rep. (N. S.) 230; Lawes v. Lawes, 9 Ch. Div. 98, 38 L. T. Rep. (N. S.) 370. See Fritz v. Fritz, 141 Iowa 721, 118 N. W. 769; Milloy v. Hoyt, 123 Ill. App. 568; Stevens v. Clark, 112 Md. 659, 77 Atl. 307; Coffey v. Coffey, 210 Mass. 480, 96 N. E. 1027; Dille v. Parker, 204 Mass. 163, 90 N. E. 520; Jarvie v. Arbuckle, 163 App. Div. 199, 148 N. Y. S. 189.

[24] Cayton v. Walker, 10 Cal. 450; Herald v. Harper, 8 Blackf. (Ind.) 170; Nystuen v. Hanson (Iowa), 91 N. W. 1071; Landry v. Landry, 23 La. Ann. 312; Wiggin v. Goodwin, 63 Maine 389; Trump v. Baltzell, 3 Md. 295; Forward v. Forward, 6 Allen (Mass.) 494; Scudder v. Andrus, 124 Mich. 252, 82 N. W. 1050; Buckham v. Singleton, 10 Mo. 405; Manufacturers' Nat. Bank v. Cox, 2 Hun 572, 5 Thomp. & C. 126 (affd. 59 N. Y. 659); Moore v. Bivins (Tex. Civ. App.), 33 S. W. 881.

[25] Horne v. Ingraham, 125 Ill. 198, 16 N. E. 868; Selz v. Mayer, 151 Ind. 422, 51 N. E. 485; Gauger v. Pautz, 45 Wis. 449.

[26] Rentz v. Granger, 64 Fla. 445, 60 So. 221; Bigham v. Tinsley, 140 S. W. 1193, adopting opinion 149 Mo. App. 467, 130 S. W. 506; Vechsler v. Blit-

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something of value was received in the settlement by the partner alleged to have been defrauded, he must return it in order to rescind the contract.[27] Where the personal representative of a deceased partner sues the surviving partner to set aside a dissolution agreement for fraud, the partnership being for the speculative purchase of cotton which was of fluctuating value, the question whether he was damaged in the settlement depends on conditions at the time of settlement.[28] A partner may sue at law to recover his share of the value of a single asset which was not included in a settlement of partnership affairs made by his copartners without his knowledge.[29] Partners are concluded by a private settlement and accounting, in the absence of fraud or mistake,[30] and the burden of showing fraud or mistake is

zer, 150 N. Y. S. 770; Morris v. Owen (Tex. Civ. App.), 143 S. W. 227; Johnson v. Belanger, 85 Vt. 249, 81 Atl. 621.

[27] Johnson v. Belanger, 85 Vt. 249, 81 Atl. 621.

[28] Morris v. Owen (Tex. Civ. App.), 143 S. W. 227.

[29] Inman v. Inkster, 90 Nebr. 704, 134 N. W. 265.

[30] Sanford v. Embry, 151 Fed. 977, 81 C. C. A. 167; Hallock v. Streeter, 102 Fed. 193; Adams v. Atkinson, 158 Ala. 225, 48 So. 346; Scheuer v. Berringer, 102 Ala. 216, 14 So. 640; Cayton v. Walker, 10 Cal. 450; Gibson v. Glover, 3 Colo. App. 506, 34 Pac. 687; McMichael v. Mackey, 7 Ga. App. 773, 68 S. E. 332; Andrews v. Stinson, 254 Ill. 111, 98 N. E. 222; Hamilton v. Wells, 182 Ill. 144, 55 N. E. 143; Milloy v. Hoyt, 123 Ill. App. 568; Spratt v. Dwyer (Iowa), 151 N. W. 474; Howard v. Pratt, 110 Iowa 533, 81 N. W. 722; Knox v. Pearson, 64 Kans. 711, 68 Pac. 613; Ferguson v. Hite, 9 Dana (Ky.) 553; Keough v. Foreman, 33 La. Ann. 1434; Coleman v. Marble, 9 La. Ann. 476; Eddy v. Fogg, 192 Mass. 543, 78 N. E. 549; McGunn v. Hanlin, 29 Mich. 476; Corner v. Mackey, 147 N. Y. 574, 42 N. E. 29 (affg. 73 Hun 236, 25 N. Y. S. 1023); Ledyard v. Bull, 119 N. Y. 62, 23 N. E. 444; Silverman v. Kogut, 143 N. Y. S. 947; Pemberton v. McAdoo, 149 App. Div. 20, 133 N. Y. S. 627; Dorsett v. Ormiston, 53 App. Div. 629, 65 N. Y. S. 931 (affg. 25 Misc. 570, 55 N. Y. S. 1037); Patterson v. Martin, 28 N. Car. 111; Lay v. Emery, 8 N. Dak. 515, 79 N. W. 1053; Little v. Little, 2 N. Dak. 175, 49 N. W. 736; Shirk's Appeal, 3 Brewst. (Pa.) 119; Main v. Howland, Rich. Eq. Cas. 352 (S. Car.); Dyer v. Adams, 56 Tex. Civ. App. 400, 120 S. W. 946; Kneeland v. McLachlen, 4 Tex. Civ. App. 203, 23 S. W. 309; Lehman v. Heuston, 73 Wash. 154, 131 Pac. 825; Holt v. Holt, 46 W. Va. 397, 35 S. E. 19; Heath v. Van Cott, 9 Wis. 516; Coventry v. Barclay, 3 DeG., J. & S. 320, 9 Jur. (N. S.) 1331, 9 L. T. Rep. (N. S.) 496; Migner v. Goulet, 31 Can. Sup. Ct. 26.

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on the partner asserting it.[82] The settlement does not bind third persons not privies of the parties to it,[83] nor does it bind any one as to matters not included.[84] A private settlement is not conclusive as to matters later arising, such as the payment of a claim not contemplated in the agreement.[85] Creditors claiming through the partners are bound if the settlement is honest, and not in violation of the bankruptcy act.[86] A partner who receives the benefits of the settlement may be estopped from questioning it,[87] and long delay in attacking such a settlement in such laches as operates to bar an action to open it or set it aside.[88] Delays of two,[89]

[82] Sanford v. Embry, 151 Fed. 977, 81 C. C. A. 167; Scheuer v. Berringer, 102 Ala. 216, 14 So. 640; Noble v. Faull, 26 Colo. 467, 58 Pac. 681; Pouder v. Tate, 76 Ind. 1; Shoemaker v. Shoemaker, 92 S. W. 546, 29 Ky. L. 134; Wells v. Erstein, 24 La. Ann. 317; Lilly v. Kroesen, 3 Md. Ch. 83; Silver v. St. Louis &c. R. Co., 72 Mo. 194 (affg. 5 Mo. App. 381); Dovey v. Dovey, 95 Nebr. 624, 146 N. W. 923; Murray v. Elston, 24 N. J. Eq. 310 (affd. 24 N. J. Eq. 589); Dorsett v. Ormiston, 25 Misc. 570, 55 N. Y. S. 1037 (affd. 53 App. Div. 629, 65 N. Y. S. 931); Anderson v. Anderson, 24 Utah 497, 68 Pac. 319 (affd. 25 Utah 164, 70 Pac. 608); Burrows v. Williams, 52 Wash. 278, 100 Pac. 340; Mahuke v. Neale, 23 W. Va. 57; Cuthbert v. Edinborough, 21 Wkly. Rep. 98. See Adlecoa v. Warner, 16 Philippine 423.

[83] Boggs v. Bird, 131 N. Y. 665, 30 N. E. 868 (affg. 14 N. Y. S. 344, 60 Hun 579, 38 N. Y. St. 992).

[84] Barker v. Boyd, 71 S. W. 528, 24 Ky. L. 1389; Hey v. Harding, 53 S. W. 33, 21 Ky. L. 771; Evans v. Clapp, 123 Mass. 165, 25 Am. Rep. 52; Iman v. Inkster, 90 Nebr. 704, 134 N. W. 265; Jarvie v. Arbuckle, 163 App. Div. 199, 148 N. Y. S. 189; Adams v. Hubbard, 221 Pa. 511, 70 Atl. 835; Ryman v. Machell, 8 Kulp. (Pa.) 316; Horne v. Greer (Tenn.), 43 S. W. 774; Morris v. Wood (Tenn.), 35 S. W. 1013.

[85] Barker v. McClelland, 50 Ind. App. 296, 98 N. E. 300; Jarvie v. Arbuckle, 163 App. Div. 199, 148 N. Y. S. 189.

[86] Boggs v. Bird, 131 N. Y. 665, 30 N. E. 868 (affg. 14 N. Y. S. 344, 60 Hun 579, 38 N. Y. St. 992); Sage v. Woodin, 66 N. Y. 578; Ludlow v. Cooper, 4 Ohio St. 1; Merchants' Bank of Canada v. McLachlan, 23 Can. Sup. Ct. 143 (revg. 2 Quebec Q. B. 431); Whitmore v. Mason, 2 Johns. & H. 204, 8 Jur. (N. S.) 278.

[87] Shows v. Folmar, 133 Ala. 599, 32 So. 495; Lucas v. Cooper, 23 S. W. 959, 15 Ky. L. 642.

[88] Baker v. Cummings, 169 U. S. 189, 42 L. ed. 711, 18 Sup. Ct. 367; Holladay v. Land &c. Imp. Co., 57 Fed. 774, 6 C. C. A. 560. See Keeley v. Hargreaves, 236 Ill. 316, 86 N. E. 132; Fitzsimons v. Foley, 80 Mich. 518, 45 N. W. 364; Dovey v. Dovey, 95 Nebr. 624, 146 N. W. 923; In re Moore, 228 Pa. 530, 77 Atl. 902. Compare Pemberton v. McAdoo, 149 App. Div. 20, 133 N. Y. S. 627.

[89] Dorsett v. Ormiston, 53 N. Y.

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four,[40] six,[41] twelve,[42] and twenty-five years,[43] have been held unreasonable under the particular circumstances. But good cause for such delay may explain it in such manner as to allow attack of a settlement after long delay, especially where there was ignorance of the fraud until shortly before the suit was brought.[44] Mutual mistake of the parties is ground for relief, if definitely and clearly proved.[45] Merely a mistaken construction by one partner of the effect of the settlement is not ground for setting it aside on suit of the other partner,[46] and it seems there should be a return of property received by a settlement, before a suit is brought to impeach it.[47] A settlement may be set aside for fraud, if clearly proved,[48] although in a few cases the settlement has not been

App. Div. 629, 65 N. Y. S. 931 (affg. 25 Misc. 570, 55 N. Y. S. 1037).

[40] Hunt v. Stuart, 53 Md. 225.

[41] Winslow v. Leland, 128 Ill. 304, 21 N. E. 588.

[42] King v. White, 63 Vt. 158, 21 Atl. 535, 25 Am. St. 752.

[43] Gilmour v. Kerr, 25 S. W. 270, 18 Ky. L. 400.

[44] Murphy v. Kirby, 3 App. Cas. (D. C.) 207; Stitzel v. Ehrman (Ky.), 114 S. W. 280; Ogden v. Astor, 4 Sandf. (N. Y.) 311; Jarvie v. Arbuckle, 163 App. Div. 199, 148 N. Y. S. 189; McGinn v. Benner, 180 Pa. St. 396, 36 Atl. 925.

[45] Blair v. Harrison, 57 Fed. 257, 6 C. C. A. 326; Claflin v. Bennett, 51 Fed. 693 (affd. 57 Fed. 257, 6 C. C. A. 326); Desha v. Smith, 20 Ala. 747; Martin v. Solomon, 5 Harr. (Del.) 344; Donahue v. McCosh, 70 Iowa 733, 30 N. W. 14; Davis v. Ferguson, 92 S. W. 968, 29 Ky. L. 214; Holyoke v. Mayo, 50 Maine 385; Lilly v. Kroesen, 3 Md. Ch. 83; Gould v. Emerson, 160 Mass. 438, 35 N. E. 1065, 39 Am. St. 501; Cobb v. Cole, 51 Minn. 48, 52 N. W. 985; Nicholson v. Janeway, 16 N. J. Eq. 285; Augsbury v. Flower, 68 N. Y. 619; Springer v. Dwyer, 58 Barb. (N. Y.) 189 (revd. on other grounds, 50 N. Y. 19); Roach v. Ivey, 7 S. Car. 434; Gething v. Keighley, 9 Ch. Div. 547, 48 L. J. Ch. 45. Compare Adams v. Hubbard, 221 Pa. 511, 70 Atl. 835; Taylor v. Wrather, 155 Ky. 25, 159 S. W. 662; Stitzel v. Ehrman (Ky.), 114 S. W. 280.

[46] Sweet v. Sweet, 14 Ind. App. 618, 43 N. E. 274.

[47] Mattingly v. Elder, 44 S. W. 139, 19 Ky. L. 1647; Ryman v. Machell, 8 Kulp. (Pa.) 316. Compare McMichael v. Mackey, 7 Ga. App. 773, 68 S. E. 332.

[48] Richardson v. Walton, 49 Fed. 888; Atwood v. Smith, 11 Ala. 894; Wiester v. Wiester, 117 Cal. xvii, 48 Pac. 1086 (1897); Loesser v. Loesser, 81 Ky. 139, 4 Ky. L. 942; Gilchrist v. Kelley, 85 Mich. 413, 48 N. W. 700; Campbell v. Campbell, 16 N. Y. S. 165, 40 N. Y. St. 817; Ryman v. Machell, 8 Kulp. (Pa.) 316; Laing v. Campbell, 36 Beav. 3, 55 Eng. Reprint 1057. See Aldecoa v. Warner, 16 Philippine 423; Taylor v. Wrather, 155 Ky. 25, 159 S. W. 662.

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set aside, but modified.[49] If the dissolution agreement contains an account stated, and provides for specific contributions or liquidated damages as to certain matters, either partner may sue the other thereon, if nothing as to partnership accounting is involved.[50] The retention by one partner of an account stated prepared and rendered to him by another, does not raise a presumption of settlement of partnership affairs on the basis stated,[51]

§ 676. Assumption of firm debts, indemnity and suretyship.—In general, it is competent for one partner to agree to assume firm debts on dissolution. This subject was fully treated in an earlier chapter, as well as those of suretyship of a retiring partner and indemnity to him.[52]

§ 677. Settlement by arbitration.— It is not uncommon to provide in partnership articles for an arbitration of controversies between partners, but such provision does not oust courts of jurisdiction[53] unless it is made a condition precedent to suit,[54] or the arbitration is brought under a statute.[55] Agreements for ar-

[49] Turner v. Otis, 30 Kans. 1, 1 Pac. 19; Stitzel v. Ehrman (Ky.), 114 S. W. 280; Trump v. Baltzell, 3 Md. 295; Daniels v. Gillespie, 65 W. Va. 366, 64 S. E. 254.

[50] Silverman v. Kogut, 143 N. Y. S. 947.

[51] Hughes v. Smither, 23 App. Div. 590, 49 N. Y. S. 115 (affd. 163 N. Y. 553, 57 N. E. 1112); Killam v. Preston, 4 Watts & S. (Pa.) 14; Geyer v. Carpenter, 15 Phila. (Pa.) 172. But compare Atwater v. Fowler, 1 Edw. Ch. (N. Y.) 417, and Keys v. Baldwin, 10 Ohio Dec. (Reprint) 268, which deny relief because of laches.

[52] See ch. 18, on change of membership.

[53] Meaher v. Cox, 37 Ala. 201; De Pusey v. Dupont, 1 Del. Ch. 82; Waugh v. Schlenk, 23 Ill. App. 433; Pearl v. Harris, 121 Mass. 390; McGunn v. Hanlin, 29 Mich. 476; Hurst v. Litchfield, 39 N. Y. 377; Page v. Vankirk, 1 Brewst. (Pa.) 282, 6 Phila. 264; Hind v. Low, 14 Haw. 438; Cooke v. Cooke, L. R. 4 Eq. 77, 36 L. J. Ch. 480; Wellington v. Mackintosh, 2 Atk. 569.

[54] Altman v. Altman, 5 Daly (N. Y.) 436; Spurrier v. La Cloche [1902], A. C. 446, 71 L. J. P. C. 101, 86 L. T. Rep. (N. S.) 631; Dinham v. Bradford, L. R. 5 Ch. 519.

[55] English Arb. Act (1889); Vawdrey v. Simpson [1896], 1 Ch. 166, 65 L. J. Ch. 369; Belfield v. Bourne [1894], 1 Ch. 521, 63 L. J. Ch. 104; Law v. Garrett, 8 Ch. Div. 26, 38 L. T. Rep (N. S.) 3; Gillett v. Thornton, L. R. 19 Eq. 559, 44 L. J. Ch. 398; Dennehy v. Jolly, 22 Wkly. Rep. 449; In re Evans, 22 L. T. (N. S.) 507.

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bitration are strictly construed, since their tendency is to deprive courts of jurisdiction.[56] There is apparently no restriction on the right of partners after dissolution to submit controversies to arbitration.[57] Proceedings upon arbitration should follow the specifications of the submission agreement.[58] It has been held that there is no right to revoke the submission after the arbitrators have begun their proceedings,[59] although the general rule as to a common law submission is that it may be revoked any time before award.[59a] Each partner is under a duty to present the facts fully,[60] and if the arbitration fails without fault of the partners, but from failure of arbitrators to agree, then there is a right to a judicial accounting.[61] The award should be in accordance with the submission and should fully dispose of all the questions presented,[62] in definite and certain terms.[63] Such an award may

[56] De Pusey v. Du Pont, 1 Del. Ch. 82; Gallier v. Walsh, 1 Rob. (La.) 226; Piercy v. Young, 14 Ch. D. 200, 42 L. T. (N. S.) 710; Cook v. Catchpole, 10 Jur. (N. S.) 1068, 34 L. J. Ch. 60; Joplin v. Postlethwaite, 61 L. T. Rep. (N. S.) 629.

[57] Hoyt v. Sprague, 103 U. S. 613, 26 L. ed. 585 (affg. Fed. Cas. No. 6810); Foster v. Carr, 135 Cal. 83, 67 Pac. 43; Tucker v. Page, 69 Ill. 179; Anderson v. Beebe, 22 Kans. 768; Adams v. Ringo, 79 Ky. 211, 1 Ky. L. 251; Hayes v. Forskoll, 31 Maine 112; Richards v. Todd, 127 Mass. 167; Shearer v. Handy, 22 Pick. (Mass.) 417; Locke v. Filley, 14 Hun (N. Y.) 139; Duxbury v. Isherwood, 12 Wkly. Rep. 821. See Haley v. Bellamy, 137 Mass. 357.

[58] Ives v. Ashelby, 26 Ill. App. 244; Adams v. Ringo, 79 Ky. 211, 1 Ky. L. 251; Witz v. Tregallas, 82 Md. 351, 33 Atl. 718; Masury v. Whiton, 111 N. Y. 679, 18 N. E. 638, 2 Silv. Ct. App. 123; Masters v. Gardner, 50 N. Car. 298; Mitchell &c. Furniture Co. v. Runk, 7 Ohio Dec. (Reprint) 491, 3 Cinc. L. Bul. 538; Graham v. Graham, 9 Pa. St. 254, 49 Am. Dec. 557; Brown v. Harklerode, 7 Humph. (Tenn.) 19; Thomson v. Anderson, L. R. 9 Eq. 523, 39 L. J. Ch. 468.

[59] Haley v. Bellamy, 137 Mass. 357, 359; Wilson v. Balcarres Brook Steamship Co. [1893], 1 Q. B. 422, 7 Aspin 321, 62 L. J. Q. B. 245.

[59a] Elliott Contracts, § 2947, and cases cited: Williams v. Branning Mfg. Co., 153 N. Car. 7, 68 S. E. 902, 31 L. R. A. (N. S.) 679n, 138 Am. St. 637n, 21 Ann. Cas. 954n.

[60] Beam v. Macomber, 33 Mich. 127.

[61] Norton v. Hayden, 129 Mich. 374, 8 N. W. 876.

[62] McCormick v. Gray, 13 How. 26 (N. S.), 14 L. ed. 36; Johnston v. Dulin, 10 Ky. L. (abstract) 403; Deneufbourg v. Gaiennie, 14 La. 53; Paine v. Paine, 15 Gray (Mass.) 299; Masury v. Whiton, 111 N. Y. 679, 18 N. E. 638, 2 Silv. Ct. App. 123; Waugh v. Mitchell, 21 N. Car. 510; Wilkinson v. Page, 1 Hare 276, 6 Jur. 567, 11 L. J. Ch. 193; Thirkell v. Strachan, 4 U. C. Q. B. 136.

[63] Carsley v. Lindsay, 14 Cal. 390; Henrickson v. Reinback, 33 Ill. 299;

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be used as a defense in an action on matters embraced in it,[64] or will be enforced by the courts if of proper character.[65] The award is not binding as to matters not included in the submission,[66] or as to matters which the arbitrators omitted through mistake.[67] The arbitrator, after making his award, can not, it is held, change it to correct a mistake without consent of both partners.[68]

Russell v. Smith, 87 Ind. 457; Abell v. Phillips, 13 S. W. 109, 11 Ky. L. 913; Witz v. Tragallas, 82 Md. 351, 33 Atl. 718; Cochran v. Bartle, 91 Mo. 636, 3 S. W. 854; Parker v. Dorsey, 68 N. H. 181, 38 Atl. 785; Bell v. Price, 22 N. J. L. 578; Herbst v. Hagenaers, 137 N. Y. 290, 33 N. E. 315 (affg. 62 Hun 568, 17 N. Y. S. 58); Osborne v. Calvert, 83 N. Car. 365; Lamphire v. Cowan, 39 Vt. 420; Harrison v. Mader, 47 Nova Scotia 1.

[64] Yates v. Petty, 1 Har. & J. (Md.) 58; Eddy v. Fogg, 192 Mass. 543, 78 N. E. 549; Richardson v. Huggins, 23 N. H. 106; Tittenson v. Peat, 3 Atk. 529, 26 Eng. Reprint 1105.

[65] Witz v. Tregallas, 82 Md. 351, 33 Atl. 718; Cochran v. Bartle, 91 Mo. 636, 3 S. W. 854; Byers v. Van Deusen, 5 Wend. (N. Y.) 268; Redick v. Skelton, 18 Ont. 100. See also Ehrlich v. Pike, 53 Misc. (N. Y.) 328, 104 N. Y. S. 818; Needham v. Bythewood (Tex. Civ. App.), 61 S. W. 426; Redick v. Skelton, 18 Ont. 100.

[66] Thornton v. McNeill, 23 Misc. 369; Masury v. Whiton, 43 Hun 638, 6 N. Y. St. 697 (affd. 111 N. Y. 679, 18 N. E. 638, 2 Silv. Ct. App. 123); Garrow v. Nicolai, 24 Ore. 76, 32 Pac. 1036; Doupe v. Stewart, 28 U. C. Q. B. 192.

[67] Deneufbourg v. Gaiennie, 14 La. 53; Paine v. Paine, 15 Gray (Mass.) 299; Reily v. Russell, 34 Mo. 524; Teacher v. Calder [1899], A. C. 451; Spencer v. Spencer, 2 Y. & J. 249, 31 Rev. Rep. 583. See also Ehrlich v. Pike, 53 Misc. 328, 104 N. Y. S. 818.

[68] Hartley v. Henderson, 189 Pa. St. 277, 42 Atl. 198.

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CHAPTER XXII

BANKRUPTCY OF PARTNERSHIP

SECTION

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708. Bankruptcy as dissolution of partnership.

§ 685. Generally[1]—Entity.—Bankruptcy of a partnership is one of the causes of dissolution of partnership, and is so classified in a preceding chapter. Because of its importance in partnership relations, a full chapter is here given to a discussion of its

[1] As the subject of bankruptcy of a partnership is almost entirely governed by the federal statute and general orders, section 5 of the Bankruptcy Act of 1898, relating specially to partnerships, and General Order No. VIII, relating to partnership proceedings, are here inserted for convenience of reference. Section Five of Bankruptcy Act—Sec. 5.

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various phases. Owing to the peculiar status of a partnership, that part of the law of bankruptcy which deals with partnership is very generally conceded to be the most difficult, and the least satisfactorily settled, of any department of bankruptcy law. The reason is that the interests of each of the partners personally is so closely interwoven with the affairs of the firm, that grave difficulties arise, especially as bankruptcy is purely a Federal institution whenever the Federal government chooses to exercise its rights, and is administered by Federal courts alone, and, further, as the

Partners—(a) A partnership, during the continuation of the partnership business, or after its dissolution and before the final settlement thereof, may be adjudged a bankrupt. (b) The creditors of the partnership shall appoint the trustee; in other respects, so far as possible, the estate shall be administered as herein provided for other estates. (c) The court of bankruptcy which has jurisdiction of one of the partners may have jurisdiction of all of the partners and of the administration of the partnership and individual property. (d) The trustee shall keep separate accounts of the partnership property and of the property belonging to the individual partners. (e) The expenses shall be paid from the partnership property and the individual property in such proportions as the court shall determine. (f) The net proceeds of the partnership property shall be appropriated to the payment of the partnership debts, and the net proceeds of the individual estate of each partner to the payment of his individual debts. Should any surplus remain of the property of any partner after paying his individual debts, such surplus shall be added to the partnership assets and be applied to the payment of the partnership debts. Should any surplus of the partnership property remain after paying the partnership debts, such surplus shall be added to the assets of the individual partners in the proportion of their respective interests in the partnership. (g) The court may permit the proof of the claim of the partnership estate against the individual estates, and vice versa, and may marshal the assets of the partnership estate and individual estates so as to prevent preferences and secure the equitable distribution of the property of the several estates. (h) In the event of one or more but not all of the members of a partnership being adjudged bankrupt, the partnership property shall not be administered in bankruptcy, unless by consent of the partner or partners not adjudged bankrupt; but such partner or partners not adjudged bankrupt shall settle the partnership business as expeditiously as its nature will permit, and account for the interest of the partner or partners adjudged bankrupt. General Order No. VIII. Proceedings in Partnership Cases. —Any member of a partnership, who refuses to join in a petition to have the partnership declared bankrupt, shall be entitled to resist the prayer of the petition in the same manner

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Federal courts aim, whenever possible, in deciding cases in any state to follow the law of that particular state. When it is considered that some states look upon a partnership as an entity, in most matters separate and apart from the individuals composing it, while other states take the opposite view, looking upon it as but little more than a convenient manner of dealing with the members of it, it is easy to see the difficulties which beset a Federal court in handling the question in a consistent manner. As to certain matters, however, the Bankruptcy Act itself recognizes the firm as an entity. The present Bankruptcy Act expressly recognizes a partnership as a "person" for the purpose of adjudication, providing that it may be adjudicated, and by implication recognizes that as an entity it may own property and owe debts. However, it can not be said that a partnership is either wholly an entity or the contrary, under the bankruptcy laws. It has certain aspects in which it is treated as an entity, others where it is not so treated. Section 5a, the provision treating this question, is: "A partnership, during the continuation of the partnership business, or after its dissolution and before final settlement thereof, may be adjudged a bankrupt." Thus the firm, for some of the purposes of bankruptcy, may be an entity.[1a] And it seems

as if the petition had been filed by a creditor of the partnership, and notice of the filing of the petition shall be given to him in the same manner as provided by law and by these rules in the case of a debtor petitioned against; and he shall have the right to appear at the time fixed by the court for the hearing of the petition, and to make proof, if he can, that the partnership is not insolvent or has not committed an act of bankruptcy, and to make all defenses which any debtor proceeded against is entitled to take by the provisions of the act; and in case an adjudication of bankruptcy is made upon the petition, such partner shall be required to file a schedule of his debts and an inventory of his property in the same manner as is required by the act in cases of debtors against whom adjudication of bankruptcy shall be made. [General Order XVIII, 1867, with no substantial change.]

[1a] Francis v. McNeal, 186 Fed. 481, 26 Am. Bkr. R. 555; In re Union Bank, 184 Fed. 224, 25 Am. Bkr. R. 148; In re Ullman, 180 Fed. 944, 24 Am. Bkr. R. 755; In re Junck, 169 Fed. 481, 22 Am. Bkr. R. 298; In re Solomon & Carvel, 163 Fed. 140, 20 Am. Bkr. R. 488; In re Ceballos, 161 Fed. 445, 20 Am. Bkr. R. 459; In re Evans, 161 Fed. 590, 20 Am. Bkr. R. 406; In re Stovall Grocery Co., 161 Fed. 882, 20 Am. Bkr. R. 537; Mills v. Fisher, 159 Fed. 897, 20 Am. Bkr. R.

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settled by the holdings under the Bankruptcy Act that a partnership as an entity may be adjudged a bankrupt.[2]

§ 686. Test of solvency of a partnership.—There are two lines of cases bearing upon the insolvency of a partnership. The one applies the principle of firm entity, and holds that the firm is solvent only when the firm property is sufficient to pay all firm debts.[3] Most cases do not apply the doctrine of firm entity to this phase of the subject, but hold that, in order to make a partnership insolvent the debts of the partnership must exceed the combined assets of the firm and of the individual partners, insofar as the assets of the individual partners are available to the payment of partnership debts.[4] The former view is perhaps the

237; In re Bertenshaw, 157 Fed. 363, 19 Am. Bkr. R. 577; Mauson v. Williams, 153 Fed. 525, 18 Am. Bkr. R. 674; In re Perley, 138 Fed. 927, 15 Am. Bkr. R. 54; In re Stein & Co., 127 Fed. 547, 62 C. C. A. 272, 11 Am. Bkr. R. 536; In re McLaren, 125 Fed. 835, 11 Am. Bkr. R. 141; In re Mercur, 122 Fed. 384, 58 C. C. A. 472, 10 Am. Bkr. R. 505; In re Farley, 115 Fed. 359, 8 Am. Bkr. R. 267; In re Hale, 107 Fed. 432, 6 Am. Bkr. R. 35; Strause v. Hooper, 105 Fed. 590, 5 Am. Bkr. R. 225; Vaccaro v. Security Bank, 103 Fed. 436, 43 C. C. A. 279, 4 Am. Bkr. R. 474; In re Barden, 101 Fed. 553, 4 Am. Bkr. R. 31; In re Sanderlin, 100 Fed. 857, 6 Am. Bkr. R. 384; In re Meyer, 98 Fed. 976, 39 C. C. A. 368, 3 Am. Bkr. R. 559; American Steel &c. Co. v. Coover, 25 Am. Bkr. R. 58; In re Pincus, 147 Fed. 621, 17 Am. Bkr. R. 331, 337; McMurtrey v. Smith, 15 Am. Bkr. R. 427; In re Corcoran, 12 Am. Bkr. R. 283. But see In re Carleton, 115 Fed. 246, 8 Am. Bkr. R. 270; In re Forbes, 128 Fed. 137, 11 Am. Bkr. R. 787.

[2] In re Meyer, 98 Fed. 976, 39 C. C. A. 368. See cases cited in preceding note.

[3] In re Everybody's Grocery & Meat Market, 173 Fed. 492, 21 Am. Bkr. R. 925; In re Bertenshaw, 157 Fed. 363, 19 Am. Bkr. R. 577; In re McMurtrey, 142 Fed. 853, 15 Am. Bkr. R. 427.

[4] Francis v. McNeal, 228 U. S. 695, 57 L. ed. 1029, 33 Sup. Ct. 505, L. R. A. 1915 E, 706. Compare Tumlin v. Bryan, 165 Fed. 166, 21 Am. Bkr. R. 319; In re Samuels, 215 Fed. 845; In re Duke, 199 Fed. 199, 28 Am. Bkr. R. 195; Washington Cotton Co. v. Morgan, 192 Fed. 310, 27 Am. Bkr. R. 638; Francis v. McNeal, 186 Fed. 481, 26 Am. Bkr. R. 555; Worrell v. Whitney, 185 Fed. 1002, 24 Am. Bkr. R. 749; In re Perlhefter, 177 Fed. 299, 25 Am. Bkr. R. 576; Tumlin v. Bryan, 165 Fed. 166, 21 L. R. A. (N. S.) 960n; Dickas v. Barnes, 140 Fed. 849, 72 C. C. A. 261, 5 L. R. A. (N. S.) 654; In re Perley, 138 Fed. 927, 15 Am. Bkr. R. 154; In re Forbes, 128 Fed. 137, 11 Am. Bkr. R. 787; Davis v. Stevens, 104 Fed. 235; Vaccaro v. Security Bank, 103 Fed. 436, 43 C. C. A. 279, 4 Am. Bkr. R. 474; In re Blair, 99 Fed. 76, 3 Am. Bkr. R. 588. See cases cited in § 685.

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more logical of the two, especially when the decisions lean toward the viewpoint of firm entity, but the latter view seems now to be the settled rule and there is but little question that, in actual practice, the latter view is found the more just and beneficial. When the latter view prevails, and a petition on behalf of the firm is filed by less than all the partners, those not joining may defend on the ground that they are solvent, and that hence the firm can not be insolvent.[5] It has been held that the inability of a partnership to meet its matured obligations, together with its dissolution, and the transfer of practically all of its property to creditors, either by way of payment or security, leaving other debts unpaid, are facts sufficient to establish its insolvency.[6] This question as to when a partnership is insolvent was for some time a debatable one because of a few Federal decisions holding that the firm was insolvent when its assets were insufficient to meet its liabilities, but the leading case so holding,[7] was overruled, and the doctrine settled by the leading case of Francis v. McNeal,[8] in which the court said: "Since Cory on Accounts was made more famous by Lindley on Partnership, the notation that the firm is an entity distinct from its members has grown in popularity, and the notion has been confirmed by recent speculations as to the nature of corporations and the oneness of any somewhat permanently combined group without the aid of law. But the fact remains as true as ever that partnership debts are debts of the members of the firm, and that the individual liability of the members is not collateral like that of a surety, but primary and direct, whatever priorities there may be in the marshaling of assets. The nature of the liability is determined by the common law, not by the possible intervention of the bankruptcy act. Therefore ordinarily it would be impossible that a firm should be insolvent while the members of it remained able to pay its debts with money available for that end. A judgment could be got and the

[5] *In re* Forbes, 128 Fed. 137, 11 Am. Bkr. R. 787.

[6] *In re* Miller, 104 Fed. 764.

[7] *In re* Bertenshaw, 157 Fed. 363, 17 L. R. A. (N. S.) 886, 13 Ann. Cas. 986.

[8] 228 U. S. 695, 57 L. ed. 1029, 33 Sup. Ct. 701, L. R. A. 1915 E, 706.

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partnership debt satisfied on execution out of the individual estates. The question is whether the bankruptcy act has established principles inconsistent with these fundamental rules, although the business of such an act is, so far as may be, to preserve, not to upset, existing relations. It is true that by section 1, the word 'person,' as used in the act, includes partnerships; that by the same section, a person shall be deemed insolvent when his property, exclusive, etc., shall not be sufficient to pay his debts; that by section 5a, a partnership may be adjudged a bankrupt, and that by section 14a, any persons may file an application for discharge. No doubt these clauses, taken together, recognize the firm as an entity for certain purposes, the most important of which, after all, is the old rule as to the prior claim of partnership debts on partnership assets, and that of individual debts upon the individual estate. Section 5g. But we see no reason for supposing that it was intended to erect a commercial device for expressing special relations into an absolute and universal formula—a guillotine for cutting off all the consequences admitted to attach to partnerships elsewhere than in the bankruptcy courts. On the contrary, we should infer from section 5, clauses c through g, that the assumption of the bankruptcy act was that the partnership and individual estates both were to be administered, and that the only exception was that in h, 'in the event of one or more, but not all, of the members of a partnership being adjudged bankrupt.' In that case, naturally, the partnership property may be administered by the partners not adjudged bankrupt, and does not come into bankruptcy at all except by consent. But we do not perceive that the clause imports that the partnership could be in bankruptcy, and the partners not. The hypothesis is that some of the partners are in, but that the firm has remained out, and provision is made for its continuing out. The necessary and natural meaning goes no further than that. On the other hand, it would be an anomaly to allow proceedings in bankruptcy against joint debtors from some of whom at any time before, pending, or after the proceeding, the debt could be collected in full. If such proceedings were allowed, it would be

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a further anomaly not to distribute all the partnership assets. Yet the individual estate, after paying private debts, is part of those assets, so far as needed. Section 5f. Finally, it would be a third incongruity to grant a discharge in such a case from the debt considered as joint, but to leave the same persons liable for it considered as several. We say the same persons, for however much the difference between firm and member under the statute be dwelt upon, the firm remains at common law a group of men, and will be dealt with as such in the ordinary courts for use in which the discharge is granted. If, as in the present case, the partnership and individual estates together are not enough to pay the partnership debts, the rational thing to do, and one certainly not forbidden by the act, is to administer both in bankruptcy. If such a case is within section 5h, it is enough that Francis never has objected to the firm property being administered by the trustee." "We must therefore accept it as established law that a partnership is not bankrupt so long as any of the members who compose it is individually solvent."[9] Only an actual partnership is subjected to adjudication as a bankrupt, and the act does not apply to cases where partnership liability has arisen by estoppel.[10] A partnership can not be adjudged bankrupt after dissolution, so long as there is a solvent partner, or former partner.[11]

§ 687. Administration of unadjudicated partner's individual estate.—The partnership may be adjudicated bankrupt, although the partners individually are not so adjudicated, and there is no proceeding against the partners individually,[12] and proceeding against the partners as individuals does not necessarily involve the firm.[13] But the proceeding against the part-

[9] In re Samuels, 215 Fed. 845.

[10] In re Pinson, 180 Fed. 787, 24 Am. Bkr. R. 804; In re Evans, 161 Fed. 590, 20 Am. Bkr. R. 406; In re Beckwith, 130 Fed. 475, 12 Am. Bkr. R. 453; Lott v. Young, 109 Fed. 798, 6 Am. Bkr. R. 436; In re Kenney, 97 Fed. 554, 3 Am. Bkr. R. 353; Buffalo Milling Co. v. Lewisburg Dairy Co., 20 Am. Bkr. R. 279.

[11] Matter of Young, 223 Fed. 659, 35 Am. Bkr. R. 200.

[12] Matter of Union Bank, 184 Fed. 224, 25 Am. Bkr. R. 148; Mills v. Lisher Co., 159 Fed. 897, 20 Am. Bkr. R. 237; Matter of Hensley & Adams, 36 Am. Bkr. R. 1.

[13] American Steel & Wire Co. v. Coover, 25 Am. Bkr. R. 58.

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nership compels the partners to bring their individual assets into the bankruptcy proceedings for administration even though proceedings would not lie against them, because they were of an exempt class or had committed no act of bankruptcy.[14] The reasons for such holding are in substance the following:[15] "One who combines with others in a partnership enterprise becomes bound for the payment of partnership debts. As partner he shares the fortunes of the partnership. In certain circumstances it may become subject to the exercise of the powers of a court of bankruptcy, where its resources will be gathered in to satisfy the claims of creditors. One of these resources is the liability of the partner, for which his individual property stands charged. It is true that, by virtue of the rule in equity, as well as in bankruptcy, for the marshaling and distribution of assets, his individual property is first applicable to the payment of his private debts, if there be any. The surplus then becomes assets for the payment of the partnership creditors. These consequences of partnership are not derived from the bankrupt act, but from the general law; and a partner is not relieved from them by his exemption from an adjudication of bankruptcy. If bankruptcy does not supervene, they would be worked out by a court of general jurisdiction, and the partner would be a party, a necessary party, to the record, so that his liability for the firm debts could be enforced. In the bankruptcy court the partner may be brought before the court for the same purposes. In order to reach his property for the payment of firm debts, it must be ascertained what surplus there will be after paying his private debts. It is said, however, that this must be done in a state court. But, however this might be, if he were a stranger, the partner is not to be regarded as a stranger, but as a party to the bankruptcy proceedings;[16] and the court had authority to take such proceed-

[14] Francis v. McNeal, 228 U. S. 695, 57 L. ed. 1029, 33 Sup. Ct. 701, L. R. A. 1915 E, 706; In re Duke, 199 Fed. 199; Dickas v. Barnes, 140 Fed. 849, 72 C. C. A. 261, 5 L. R. A. (N. S.) 654.

[15] Dickas v. Barnes, 140 Fed. 849, 72 C. C. A. 261, 5 L. R. A. (N. S.) 654.

[16] Citing Loveland Bankruptcy, 2 ed., p. 251, and cases in note 42.

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ings as were necessary to ascertain what assets were available, and to subject them to the requirements of the case before it."[17] The case of Francis v. McNeal settled the law as to when a partnership is insolvent, but the later cases are not in entire accord as to the effect of that holding on the right to administer the estate of a partner who is not adjudicated a bankrupt. In one later case,[18] the court, admitting that in several cases it has been held that the bankruptcy court can administer on the estate of nonbankrupt partners.[19] said that these cases proceeded on the theory that a firm may be bankrupt although some of its members remain solvent, and that such theory is contrary to the rule, established by Francis v. McNeal, and that a court has no right to administer upon an alleged secret partner's estate without declaring him a bankrupt or finding him insolvent. This holding was followed in a later case,[20] the judge saying: "I think it may be regarded as definitely settled that a court of bankruptcy in proceedings against a partnership has no jurisdiction to administer upon the estate of an alleged secret partner without declaring him a bankrupt or finding him insolvent." In a later case it was said concerning a partner who did not join in a voluntary petition and as to whom there was no allegation of an act of bankruptcy authorizing an adjudication as to him, that "upon an adjudication of bankruptcy against a firm the nonjoining partner may be required to file a schedule of his debts and an inventory of his property, in accordance with the concluding clause of the Eighth General Order in Bankruptcy."[21] In another case it was said: "No firm can be compulsorily adjudicated a bankrupt in which any partner appears to be solvent to the extent of having a surplus of property over the debts for which he is personally liable and the debts for which

[17] Francis v. McNeal, 228 U. S. 695, 57 L. ed. 1029, 33 Sup. Ct. 701, L. R. A. 1915 E, 706.

[18] In re Samuels, 215 Fed. 845.

[19] Citing Dickas v. Barnes, 140 Fed. 849, 72 C. C. A. 261, 5 L. R. A. (N. S.) 654; Matter of Lattimer, 174 Fed. 824; In re Junck, 169 Fed. 481; In re Ceballos, 161 Fed. 445; In re Stokes, 106 Fed. 312.

[20] Matter of Kramer, 33 Am. Bkr. R. 223.

[21] Matter of Lenoir-Cross & Co., 226 Fed. 227, 35 Am. Bkr. R. 774.

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he is liable as a member of the firm."[22] Section 5h of the Bankruptcy Act provides: "In the event of one or more, but not all of the members of a partnership being adjudged bankrupt, the partnership property shall not be administered in bankruptcy, unless by consent of the partner or partners not adjudged bankrupt; but such partner or partners not adjudged bankrupt shall settle the partnership business as expeditiously as its nature will permit, and account for the interest of the partner or partners adjudged bankrupt." In another case it is said as to section 5h: "The plain language of this provision negatives the existence of a right of the court as a court of bankruptcy to draw to itself the administration of the partnership estate when only one of the partners has been adjudged bankrupt except in the event of the partner or partners not adjudged bankrupt consenting to its doing so. The right in such a case of a solvent partner to have the partnership business administered elsewhere than in bankruptcy is absolute unless waived by him."[23] "If the firm is insolvent and a solvent partner consents to the administration of the firm and individual assets, it would seem that section 5h would apply and that an adjudication against the insolvent partners and against the firm would be legally possible. The administration of all the assets in the bankruptcy court would follow, and the solvent partner would be entitled to guide or share in that administration under the jurisdiction of the court."[24] As to the case of In re Samuels,[25] above referred to, the court said that it, "insofar as it decides that a partnership can not be insolvent provided one partner is solvent, does not cover the case presented herein under subdivision 'h,' where the partner not adjudged a bankrupt consents to the adjudication of the partnership or acquiesces in the finding of insolvency of the partnership and consents to the administration in bankruptcy." In another case[26] it was said that section 5h does not prevent a court which has

[22] In re Kobre, 224 Fed. 106, 35 Am. Bkr. R. 389, 413.

[23] Marnet Oil & Gas Co. v. Staley, 33 Am. Bkr. R. 270.

[24] In re Kobre, 224 Fed. 106, 35 Am. Bkr. R. 389, 415.

[25] 215 Fed. 845.

[26] Armstrong v. Fisher, 34 Am. Bkr. R. 701.

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adjudged a partnership composed of two members, and one of its members bankrupt, from drawing to itself and administering the property of the other member, that section 5h "is limited in its effect to those cases in which one or more but not all of the partners have been, and the partnership has not been adjudged bankrupt," and that even if it did apply, "the failure of the petitioner to object to the administration of the partnership property in bankruptcy, and himself to settle the partnership business, would estop him from successfully claiming that his individual estate could not be drawn into and administered by the bankruptcy court." The amendment of 1910 to the Bankruptcy Act gives to the trustee in bankruptcy of a partnership the rights of creditors as against a firm and its members. Before that time he had merely the rights of the firm. Several of the decisions, however, which authorize the administration of a nonbankrupt partner's assets were made in cases which arose before the amendment of the law. The question has been asked as to whether the estate of a solvent partner can be drawn in without his consent. The recent holdings seem to settle this in the negative. There can be no solvent partner so long as the firm assets and the assets of all the partners are insufficient to pay all firm and individual debts. If a partner's individual property is sufficient to pay all firm debts for which he is liable and all his individual debts, then he is solvent, and the partnership is solvent. He may, however, consent to the adjudication. A nonconsenting partner can not be adjudged a bankrupt on a voluntary petition filed by another partner, as in only one way can a person be adjudged an involuntary bankrupt under the law, that is on the petition of a creditor or creditors.[27]

§ 688. **Partnership and individual interests.**—The Bankruptcy Act provides that "The creditors of the partnership shall appoint the trustee; in other respects, so far as possible, the estate shall be administered as herein provided for other estates."[28] The

[27] Matter of Hansley, 36 Am. Bkr. R. 1.

[28] Sec. 5, b.

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provision above, that "the creditors of the partnership shall appoint the trustee," has been construed to apply only in the case of a joint petition. In case of the separate bankruptcy of one of the members, separate creditors may vote, although all assets are partnership assets.[29] In case the partners desire discharge from individual liabilities, they should file separate and individual petitions.[30] Section 5c of the Act of Bankruptcy provides that, "The court of bankruptcy which has jurisdiction of one of the partners may have jurisdiction of all of the partners and of the administration of the partnership and individual property." It has been held under this provision that where a firm is brought before a court for adjudication in bankruptcy, the individual estates of the partners are also drawn to the court for administration,[31] and a summary order may be issued to the assignee for the benefit of creditors to surrender the property held by him; yet it is held[32] that no jurisdiction is conferred on the court to adjudicate a partner in a proceeding in involuntary bankruptcy brought against his copartner. Likewise, no individual member of a firm which is being adjudicated, can himself be adjudicated, unless he has committed an act of bankruptcy.[33] Sec. 5d provides that, "The trustee shall keep separate accounts of the partnership property and of the property belonging to the individual partners," and in Sec. 5e it is provided that, "The expenses shall be paid from the partnership property and the individual property in such proportion as the court shall determine." Sec. 5f: "The net proceeds of the partnership property shall be appropriated to the payment of the partnership debts and the net proceeds of the individual estate of each partner to the payment of his individual debts. Should any surplus remain of the property of any partner after paying his individual debts, such surplus shall be added to the partnership assets and be applied to the payment of the partnership debts. Should any surplus of the partnership

[29] In re Beck, 110 Fed. 140.

[30] In re Farley, 115 Fed. 359.

[31] In re Stokes. 106 Fed. 312; In re Meyer, 98 Fed. 976, 36 C. C. A. 368.

[32] Mahoney v. Ward, 100 Fed. 278.

[33] In re Meyer, 98 Fed. 976, 39 C. C. A. 368.

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property remain after paying the partnership debts, such surplus shall be added to the assets of the individual partners in the proportion of their respective interests in the partnership." Sec. 5g: "The court may permit the proof of the claim of the partnership estate against the individual estates, and vice versa, and may marshal the assets of the partnership estate and the individual estates so as to prevent preferences and secure the equitable distribution of the property of the several estates." A bankruptcy suit involving a partnership is much more complicated, as seen by the above provisions of the Act, than where simply an individual is involved, as the partnership suit involves other interests as well. Sec. 5f, above quoted, provides for the method of separation of estates, and it has been interpreted and applied in very many cases. The property of all estates included in the case are administered by one trustee (or joint trustees),[34] but each estate must be accounted for separate and apart from the others. Bankruptcy of partnerships is further complicated by the fact that all the partners may be joined in a partnership, which is known by different names in different places, but it is held that, in such case, the whole combination will be treated as one, and administered as such.[35] It may also happen that a bankrupt is a partner in several firms, which are also bankrupt. This would, of course, bring all of the firms under the jurisdiction of the court.[36] As a general rule, the rights of creditors to participate in a certain estate is governed by the question of whether it is individual or partnership property, or debts, and, while often very simple of solution, it is also at times very difficult, and a few cases will be given on this proposition.

§ 689. Particular instances of partnership or individual ownership or indebtedness.—There is a presumption at law, which may be rebutted, that property standing in the name of the firm belongs to the firm, and, if the property is in the name of

[34] In re Coe, 154 Fed. 162, 18 Am. Bkr. R. 715.

[35] In re Vetterlein, 44 Fed. 57; In re Williams, Fed Cas. No. 17707, 3 Woods (U. S.) 493.

[36] Loveland on Bankruptcy, 4th ed., Vol. 1, p. 549.

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a partner, that it is his individually, and the same rule applies as to indebtedness. If, however, it is shown that property was purchased with the funds belonging to the firm, and the title placed in a partner, then the presumption changes, and it is presumed that the firm is the real owner.[37] Generally, partnership property consists of its money, stock in trade, outstanding claims and accounts, and any other property purchased with partnership funds,[38] while a partner's individual property consists of chattels, rights, or real estate owned solely by an individual partner.[39] An insurance policy on the life of one partner, which he has at times pledged for firm debt, does not thereby become firm property.[40] Property used by a partnership for partnership purposes is presumptively partnership property,[41] but if the property used by the firm belongs to one partner and the others have no interest therein, such property is the individual property of that partner.[42] Where property owned by one partner originally, was later used for firm purposes, the agreement of the partners controls as to whether it is joint or separate property.[43] It might be said that many of the rules, as to ownership of property or the liability for debts, as given in this chapter, at first glance seem to be contrary to the general principles of partnership law, but it must be remembered that in bankruptcy the rule may vary much from ordinary cases. As between a member of a firm and partnership creditors, he is often estopped from setting up defenses, by reason of his own fault, where the same estoppel will not apply to the trustee in bankruptcy of his estate. The reason is plain. In the one case, it is the person who should be estopped from setting up his own fault. In the other it is simply two sets of creditors, both of whom may be innocent of any fault and

[37] In re Swift, 114 Fed. 947, 9 Am. Bkr. R. 237; Ex parte Connell, 3 Deac. Eng. Bkr. 201, 3 M. & A. 581.

[38] Osborn v. McBride, Fed. Cas. 10593, 3 Sawy. 590; Hiscock v. Jaycox, Fed. Cas. 6531.

[39] In re Lowe, Fed. Cas. 8564; In re Clark, Fed. Cas. No. 2798, 4 Ben. 88.

[40] Hiscock v. Varick Bank, 206 U. S. 28, 18 Am. Bkr. R. 1; In re Day, 176 Fed. 377, 23 Am. Bkr. R. 56.

[41] Featherstonhaugh v. Fenwick, 17 Ves. 298.

[42] Loveland on Bankruptcy, 4th ed., Vol. 1, p. 555.

[43] In re Swift, 114 Fed. 947, 9 Am. Bkr. R. 237.

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the court would hardly, in many cases, apply the same rigid rule to the trustee for the creditors as it would to the bankrupt himself. Very much the same rule applies to debts as to the ownership of property, as stated above. A note given by the firm, and indorsed by one partner, has been held to be a firm debt,[44] and the real transaction, and the question whether the debt is by the firm or individual may be shown, even by parol evidence.[45] Where the firm name appears on commercial paper, the presumption is that it is bound and the burden is on the firm to show nonliability.[46] This rule is applied where a note has been indorsed in the firm name, though for accommodation of the maker, if the holder is an innocent third person.[47] The note of an individual partner, given for the firm's sole benefit, is a partnership debt.[48] If credit was extended to the partner on a note signed by him for a loan used by the firm, the debt is an individual debt; if credit was given to the firm, a firm debt.[49] If one partner has fairly bought out the other, without fraud, and assumed the partnership debts, they become his individual debts,[50] though the partnership creditors are not bound by the assumption unless they impliedly or expressly consent to it.[51] The firm, by assumption on sufficient consideration may make individual debts into firm debts,[52] except where the creditor had no knowledge of the assumption and did not acquiesce in it.[53]

[44] In re Speer Bros., 144 Fed. 910, 10 Am. Bkr. R. 524.

[45] In re Stoddard Bros. Lumber Co., 169 Fed. 190, 22 Am. Bkr. R. 435.

[46] Winship v. Bank of United States, 5 Pet. (U. S.) 529, 8 L. ed. 216.

[47] Union Nat. Bank v. Neill, 149 Fed. 720, 17 Am. Bkr. R. 841; Merchants' Bank v. Thomas, 121 Fed. 306, 10 Am. Bkr. R. 299.

[48] In re Warren, Fed. Cas. No. 17191, 2 Ware 322; In re Culver, 176 Fed. 450; Davis v. Turner, 120 Fed. 605, 56 C. C. A. 669, 9 Am. Bkr. R. 704.

[49] Strause v. Hooper, 105 Fed. 590.

[50] In re Rice, Fed. Cas. 11750; In re Pease, Fed. Cas. 10881; In re Downing, Fed. Cas. 4044, 1 Dill. 33; In re Collier, Fed. Cas. 3002.

[51] In re Keller, 109 Fed. 118. See in re Denning, 114 Fed. 219.

[52] In re Dresser, 135 Fed. 495, 68 C. C. A. 207 (affd. 200 U. S. 532, 50 L. ed. 584, 26 Sup. Ct. 316); In re Speer Bros, 144 Fed. 910; Merchants' Bank v. Thomas, 121 Fed. 306.

[53] Hibberd v. McGill, 129 Fed. 590, 64 C. C. A. 158.

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§ 690. Authority to adjudge partnership bankrupt.—Section 4a provides that, "Any person who owes debts, except a corporation, shall be entitled to the benefits of this act as a voluntary bankrupt," and the following subdivision makes "any natural person, except a wage-earner, or a person engaged chiefly in farming or the tillage of the soil, any unincorporated company, and any corporation engaged principally in manufacturing, trading, printing, publishing, mining, or mercantile pursuits, owing debts to the amount of one thousand dollars or over, may be adjudged an involuntary bankrupt upon default or an impartial trial, and shall be subject to the provisions and entitled to the benefits of this act. Private bankers, but not national banks or banks incorporated under state or territorial laws, may be adjudged involuntary bankrupts." Sec. 5a, as we have seen herein, expressly provides for bankruptcy of partnerships, so, unless a partnership should come within the general exceptions in Sec. 4, it becomes liable to either voluntary or involuntary bankruptcy. It is very plain, and is never questioned, but that a partnership may be adjudicated under the present act (1898), although the former act of 1867 only allowed the adjudication of "partners in trade." but not to the firm itself.[54]

§ 691. Commencement of proceedings.—An action in bankruptcy may be either voluntary or involuntary, or both voluntary and involuntary, in part. It is voluntary when the petition is filed by the party to be adjudicated. It is involuntary when the petition is filed by another party. It is both voluntary and involuntary when some of the parties ask for the hearing, and some oppose it. For example, if all the partners in a firm join in the petition, it is wholly voluntary. If creditors alone file the petition, it is wholly involuntary. If, however, there is a firm of several members, some of whom join in a petition and the others do not join, the proceeding is voluntary as to those joining and invol-

[54] Mills v. Fisher Co., 159 Fed. 897, 131, 111 Pac. 217, 30 L. R. A. (N. S.) 16 L. R. A. (N. S.) 656n. American 787.
Steel & Wire Co. v. Coover, 27 Okla.

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untary as to those not joining.[55] In involuntary proceedings notice to the alleged bankrupt is necessary; hence where some partners join and others do not, those not joining must be served with notice. After such notice, if the persons not originally joining, shall join, then the proceeding becomes entirely voluntary.[56] Filing a voluntary petition by one or all of the partners, for the firm is, in itself, an act of bankruptcy,[57] and no act of bankruptcy need be alleged, either by the firm or the petitioning creditors, other than their inability to pay debts and willingness to be adjudged bankrupts on that ground. The firm and the petitioning creditors commit an act of bankruptcy by the filing of the petition.[58] There may be a joinder of the applications of the firm and of all or part of the members thereof, in the same petition, but there should be separate schedules filed for the firm and for each partner seeking adjudication.[59] It will be observed that this is, in practice, often a difficult operation, owing to the interwoven liabilities and rights existing between the firm and the members thereof, and the difficulty, in actual practice in many instances of determining what are partnership debts, primarily, and what are the debts of individual partners, and the same rule applies to assets. It has been held[60] that a note signed by members of a firm as individuals, with no indication on its face that it was given for partnership debt, is presumptively the debt of the individuals and not provable against the partnership assets. This is, however, simply presumptive, and can undoubtedly, like other presumptions of law, be overturned and the real facts shown, unless such real facts were unknown to the creditor, and he gave the credit upon the individuals, as distinguished from the firm.

[55] Medsker v. Bonebrake, 108 U. S. 66, 2 Sup. Ct. 351; In re Junck, 169 Fed. 481, 22 Am. Bkr. R. 298; In re Carleton, 115 Fed. 246, 8 Am. Bkr. R. 270; In re Murray, 96 Fed. 600.

[56] In re Murray, 96 Fed. 600, 3 Am. Bkr. R. 601.

[57] In re Junck, 169 Fed. 481, 22 Am. Bkr. R. 298.

[58] In re Ceballos, 161 Fed. 445, 20 Am. Bkr. R. 467.

[59] In re Forbes, 128 Fed. 137. See In re Grant Bros., 106 Fed. 496; In re Meyer, 98 Fed. 976, 39 C. C. A. 368; Green River Deposit Bank v. Craig Bros., 6 Am. Bkr. R. 381; Loveland on Bankruptcy, 4th ed., Vol. 1, p. 543.

[60] In re Jones, 116 Fed. 431.

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This is, however, as a general thing, an immaterial distinction in general partnerships, inasmuch as each partner is individually responsible for all the debts of the firm, and if the firm assets should not meet its liabilities, its creditors would have recourse to the assets of the individual partners. It can be seen, however, how such a rule might change results materially. For example, when individual members and the firm are both adjudicated, the law provides that the estates of each are respectively liable for their own liabilities. In case individual partners should sign a note, and later both the firm and all the partners signing the note should become bankrupt, the partnership assets being twenty-five per cent. of the amount of its assets, while the combined assets of the partners individually amount to fifty per cent. of the assets of the individuals signing the note, in such case it would manifestly be to the interest of the holder of the note to be allowed to prove as against the partners individually. On the other hand, in case only a part of the partners should sign the note, it might so happen that it would be most desirable to prove against the partnership, and, if necessary, fall back upon certain nonbankrupt partners' partnership liability who did not join in the execution of the note. It is said to be the better practice to file a separate petition for the partnership and for each individual partner who desires to come under the act.[61]

§ 692. Result of proceedings where only part of partners join.—It has hereinbefore been stated that less than all of the partners may file a voluntary petition, and that each must file a separate schedule. Any partner refusing to join in the petition, an adjudication being made, must file such a schedule of his debts and inventory of his property as is required in cases of debtors against whom adjudication shall be made,[62] but can not be personally adjudicated a bankrupt unless he has personally committed an act of bankruptcy.[63] It is not to be understood from

[61] Matter of Hansley, 36 Am. Bkr. R. 1.

[62] Gen. Ord., 8.

[63] Holmes v. Baker & Hamilton, 160 Fed. 922. Compare In re Forbes, 128 Fed. 137; In re Meyer, 98 Fed. 976, 39 C. C. A. 368.

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this, however, that the individual estate of a nonbankrupt can not be drawn into bankruptcy, even though there be no adjudication of the nonbankrupt.[64] Sec. 5h, above quoted, makes provision for the solvent partners, if any there be, and if they so desire, settling up the partnership business, and accounting for the interest of the bankrupt partner therein, and in such a case the partnership property shall not be administered in bankruptcy, but by the solvent partner, who shall report to the court, and the court shall make proper distribution of the assets to the creditors.[65] In case the solvent partner does not desire to so close up the partnership business, then it should be administered by the bankruptcy court. The rule that the estate of nonbankrupt partners, even those who are not proper subjects of adjudication, can be brought in through the adjudication of the firm, might seem illogical, in that it may bring in the estate of a partner, such as a wage-earner, or a farmer, when they would not, under the act, be subject to bankruptcy proceedings if it were directed at them alone. This, moreover, is not changed, by the clause above cited giving the solvent partner not joining the privilege of settling up the partnership himself, if he so desires, as the wage-earner or farmer might himself be insolvent. The rule is, however, undoubtedly just, and it is perhaps better to be right than to be logical. The court, it should be remembered, when once it secures jurisdiction over one partner, has jurisdiction over the firm and individual partners who are bankrupt.[66] But under General Order VI, the court in which a petition is first filed may, for convenience of the parties, transfer jurisdiction to another district, in which a petition has also been filed.[67]

[64] In re Duke, 199 Fed. 199; In re Junck, 169 Fed. 481, 22 Am. Bkr. R. 298; Dickas v. Barnes, 140 Fed. 849, 72 C. C. A. 261, 5 L. R. A. (N. S.) 654. See ante, § 687.

[65] In re Junck, 169 Fed. 481, 22 Am. Bkr. R. 298; In re Solomon & Carvel, 163 Fed. 140; In re Mercur, 116 Fed. 655, 8 Am. Bkr. R. 275. See ante, § 687.

[66] Bankruptcy Act, § 5c. Loveland on Bankruptcy, 4th ed., Vol. 1, p. 549.

[67] In re Sears, 117 Fed. 294, 54 C. C. A. 532. See In re Blair, 99 Fed. 76; In re Waxelbaum, 98 Fed. 589.

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§ 693. **Preferences.**—If a firm is insolvent, and the partners therein then divide the assets among themselves and dissolve the firm, the question arises as to whether, in case a bankruptcy suit is filed within four months thereafter, such assets belong to the partners. It has been held[68] that such action is void, and the assets are still the property of the firm. The good faith payment of individual debts from partnership funds, with no intention to defraud, has been held not to be a voidable preference.[69] The court in one case said:[70] "Any other interpretation would produce intolerable vexation and confusion, for in the daily conduct of business partners are necessarily and constantly applying partnership property to the payment not only of large individual obligations, but to the payment of their petty individual debts for living expenses, and are often devoting their individual property to the promotion of the partnership business and the discharge of the partnership debts. It never could have been, it never was, the intention of Congress that these transactions—these transformations of partnership into individual and of individual into partnership property within four months, or within any other time preceding the commencement of bankruptcy proceedings—should either be rescinded or avoided by subsequent adjudication in bankruptcy unless they were actually fraudulent or voidably preferential. It did not make them fraudulent in themselves. The terms of section 5f and the natural and rational interpretation of them in the light of the general rules of law and of the entire act in which they appear, limit their application to partnership and individual property at the commencement of bankruptcy proceedings, and to property the transfer of which is fraudulent for other reasons than that partnership property was applied to the payment of individual debts, or individual property to the payment of partnership debts. This

[68] In re Head, 114 Fed. 489.

[69] Sargent v. Blake, 160 Fed. 57, 15 Ann. Cas. 58, 17 L. R. A. (N. S.) 1040, and note; Merchants' Bank v. Thomas, 121 Fed. 306; Crawford v. Sternberg, 33 Am. Bkr. R. 677; Matter of McConnell, 32 Am. Bkr. R. 589. Contra: In re Floyd & Co., 156 Fed. 206.

[70] Crawford v. Sternberg, 33 Am. Bkr. R. 679.

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conclusion is in accord with the general principles applicable to the management and disposition of partnership property. There are two rules of law, which at different times apply to the management and disposition of the property of a partnership, first, partners own, and with the consent of each, have the right and power to sell and dispose of the partnership property, to transform it into individual property of one or more of the partners, to apply it or its proceeds to the payment of their individual debts in preference to those of the partnership, and to make such other honest disposition of it as they deem fit; second, in the administration of the property of a partnership in the courts the creditors of the partnership have the right to the application of the partnership property to the payment of the partnership debts in preference to the individual debts of the respective partners. The first is a rule of operation, the second a rule of administration. The first governs during the operation of the partnership business and the disposition of the partnership property by the partners, the second operates during the administration of the partnership property after it is brought into the custody of the court. The first rule prevails until by some suit or act the interposition of some court is invoked to administer the partnership property, and until that time the second rule is ineffective. Before the partnership property is placed in custodia legis for administration, it is not held in trust for the payment of the partnership creditors in preference to the creditors of the individual partners. The partnership creditors have no lien upon it, and no independent right to its application to the payment of their claims in preference to the claims of the creditors of the individual partners. Each partner, however, has the right to require the partnership property to be applied to the payment of the partnership debts in preference to the debts of the individual partners, to the end that he may not be required to pay the former out of his individual estate. The right of the creditors of the partnership to payment out of the partnership property in preference to the individual creditors is the mere right by subrogation or derivation to enforce their right of one of the partners after

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the partnership property has been placed in the custody of the law. Until it has been so placed each partner has plenary power at any time to release or waive this right, and if each partner has done so and at the time the property comes within the jurisdiction of a court no partner has this right, then no creditor of the partnership has it, for a stream can not rise higher than its source." But there is always the question whether the transfer was made in due course of business,[71] or whether a fraudulent preference was in fact intended.[72] It has been held that the indorsement to a creditor of firm notes by a solvent individual partner, is a transfer and a preference, and that it would be a preference to allow the payment of such notes from that partner's individual assets.[73] However, it is held that unless he had knowledge of insolvency of some of the partners, a firm creditor who takes notes of an individual partner for his debt does not obtain a voidable preference.[74] It is also held that "as it is not fraudulent for an individual debtor to convert property which is not exempt into that which is, it is not fraudulent for individuals constituting a partnership to sever the joint interest in partnership property which is not yet in the custody of the law, and thereafter to hold their exemptions out of such property."[75]

§ 694. Order of proof of debts.—In general, the rules discussed in the chapter on application of partnership assets apply to the proof of debts in bankruptcy of a partnership. The Uniform Partnership Act provides that, "where a partner has become bankrupt or his estate is insolvent, the claims against his

[71] In re Kahley, Fed. Cas. No. 7593, 2 Biss. 383.

[72] Vetterlein v. Barnes, 124 U. S. 169, 31 L. ed. 400, 8 Sup. Ct. 441; In re Jones, 100 Fed. 781.

[73] Matter of Frazer, 34 Am. Bkr. R. 467.

[74] Matter of Hull, 34 Am. Bkr. R. 447.

[75] In re Phillips (D. C.), 209 Fed. 400, 31 Am. Bkr. R. 597; Bates v. Callender, 3 Dak. 256, 16 N. W. 506; Lee v. Bradley Fertilizer Co., 44 Fla. 787, 33 So. 456; Fairfield Shoe Co. v. Olds, 176 Ind. 526, 96 N. E. 592; Crawford v. Sternberg, 33 Am. Bkr. R. 677. Citing: Goody v. Werbe, 117 Ind. 154, 19 N. E. 764; Worman v. Giddey, 30 Mich. 151; Mortley v. Flanagan, 38 Ohio 401; 2 Freeman Execution (3d ed.), § 221. See matter of McConnell, 32 Am. Bkr. R. 589.

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separate property shall rank in the following order: I. Those owing to separate creditors. II. Those owing to partnership creditor. III. Those owing to partners by way of contribution.[76] Section 5f of the Bankruptcy Act provides that, "the net proceeds of the partnership property shall be appropriated to the payment of the partnership debts, and the net proceeds of the individual estate of each partner to the payment of his individual debts. Should any surplus remain of the property of any partner after paying his individual debts, such surplus shall be added to the partnership assets and be applied to the payment of the partnership debts. Should any surplus of the partnership property remain after paying the partnership debts, such surplus shall be added to the assets of the individual partners, in the proportion of their respective interests in the partnership." Firm debts are to be proved primarily against the firm, and secondarily against the individual partners, while the individual debts of a partner should be proved primarily against the partner's estate, and secondarily against the partnership, to the extent of the debtor partner's share, and the primary debts must be satisfied in each case before the secondary debts can participate.[77]

§ 695. Exception to general rule—Where no partnership estate and partners are all insolvent.—An exception to the general rule above given has been applied when there is no firm estate whatsoever and the partnership and individual partners are all insolvent and all in bankruptcy, and in such case both the firm and the individual creditors share alike ratably in the indi-

[76] Uniform Partnership Act, § 40 (i).

[77] Adams v. Deckers Lumber Co., 202 Fed. 48; Johnson v. Norris, 190 Fed. 459; In re Chandler, 185 Fed. 1006; In re Union Bank, 184 Fed. 224, 25 Am. Bkr. R. 148; In re Effinger, 184 Fed. 728; In re Filmar, 177 Fed. 170, 24 Am. Bkr. R. 194; In re Terens, 175 Fed. 495, 23 Am. Bkr. R. 680; In re Blanchard, 161 Fed. 793, 20 Am. Bkr. R. 417; In re Janes, 133 Fed. 912, 67 C. C. A. 216; Buckingham v. First Nat. Bank, 131 Fed. 192, 65 C. C. A. 498, 12 Am. Bkr. R. 465; In re Denning, 114 Fed. 219; In re Mosier, 112 Fed. 138; Jarecki Mfg. Co. v. McElwaine, 107 Fed. 249; In re Wilcox, 94 Fed. 84.

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vidual estate.[78] In one of these cases the court said:[79] "In view of this authoritative declaration that the equities of the partnership creditors are derived from the equity of the partners, and that it is within the power of the partners to put an end to the equities of the firm creditors, by a bona-fide transfer of the firm assets to one partner or to a third party, wherein is the equity in the ruling that, in cases wherein the equity of the firm creditors has been terminated, not through their act nor with their consent, but by the act of the partners in selling the firm assets to one of their number or to a third party, and subsequently members of the firm are put into bankruptcy as individuals, the individual creditors are entitled to exclude the firm creditors from sharing in the assets until the individual debts are paid in full. In such cases there is no other fund to which the firm creditors can resort for payment, and the practical result of the rule laid down in the Wilcox Case is that, in all cases wherein the equity of the firm creditors have been destroyed by the action of the partners, in converting the firm property into individual assets by action of the partners, in converting the firm property into individual assets by a sale thereof to one of the partners, the individual creditors are entitled to be preferred, and are entitled to exclude the firm creditors from sharing in these assets, even though they were originally the property of the firm. A very large proportion of the cases brought in bankruptcy under the provisions of the present act are cases wherein the bankrupts have been members of one or more partnerships which have been dissolved long since, and in which the only assets are those belonging to the individual bankrupt; and, if it be the rule that the individual creditor is always entitled to be first paid from the individual assets, it follows that in all these cases the debts due the firm creditors are discharged, yet these creditors are barred from any share in the assets of the bankrupt. The variant views

[78] In re Rice, Fed. Cas. No. 11750, 9 Nat. Bkr. R. 373; In re Gray, 208 Fed. 959; Conrader v. Cohen, 121 Fed. 801, 58 C. C. A. 249, 9 Am. Bkr. R. 619; In re Green, 116 Fed. 118; In re West, 39 Fed. 203.

[79] In re Green, 116 Fed. 118, 8 Am. Bkr. R. 553.

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set forth in the numerous decisions cited in the Wilcox Case serve to show that it is practically impossible to formulate a single general rule that will meet the equities of every case, but the adoption of the rule that in every instance wherein there are firm and individual creditors, but the assets are individual only, the latter class of creditors are to be paid in full to the exclusion of the firm creditors, will certainly work injustice in so many cases that I should hesitate long before accepting it in the absence of a controlling decision by an appellate court. The Supreme Court having decided that the firm assets may be converted into individual assets by the action of the partners, I can not see the equity in the view that holds, in effect, that it is within the power of the partners to determine the equity of the firm creditors in the firm assets, and that the same act which terminates the equity of the firm creditors creates a preference in favor of the individual creditors, enabling them to secure payment in full of their claims out of funds which in many cases are wholly or largely the proceeds of the property which was originally firm assets."

§ 696. Cases not recognizing exception to general rule where no partnership estate and partners are all insolvent.— There are cases which hold the contrary doctrine, and do not recognize the exception above given, on the ground that, although there was, for a long period, such a rule in equity and bankruptcy courts, the fact that the exception was not expressly embodied in the present Bankruptcy Act, in itself would preclude the exception.[80] The reasoning of this class of cases is illustrated in the following extract:[81] "The first question before the court is whether the petitioner, the Canton Buggy Company, as a creditor of the late partnership, is entitled to share ratably with Hull's

[80] McNabb v. Bank of Le Roy, 198 U. S. 583, 25 Sup. Ct. 802; Euclid Nat. Bank v. Union Trust & Deposit Co., 149 Fed. 975, 17 Am. Bkr. R. 834; In re Henderson, 142 Fed. 588; In re Janes, 133 Fed. Rep. 912, 13 Am. Bkr. R. 341; In re Janes, 128 Fed. 527; In re Wilcox, 94 Fed. 84; Matter of Hull, 34 Am. Bkr. R. 447; In re Corcoran, 12 Am. Bkr. R. 283.

[81] Matter of Hull, 34 Am. Bkr. R. 447.

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creditors in the settlement of his estate. The question is whether because of the fact that there were no partnership assets available for distribution to partnership creditors, the rule of distribution in paragraph (f) of section 5 of the Bankruptcy Act is subject to the exception recognized in some states, Ohio for one, as applicable in such cases.[82] Under section 36 of the old Bankruptcy Act, section 5121 R. S. (1878), the current of opinion was somewhat strongly to the point that where there is no partnership estate, and no solvent partner, partnership creditors are entitled to share ratably with individual creditors in the individual assets of the bankrupt partner.[83] But upon the present law the greater authority is to the point that no such exception should be recognized, but that the distribution should follow strictly the language of the act. * * * In the Wilcox Case, Judge Lowell, in an elaborate review of the development and practice of the exception in equity procedure, points out the difficulties in the application, while in the Henderson Case, Judge Dayton discusses the frequent inequity resultant from its employment, and the absurdities involved in giving it any force whatever, as in Marwick's Case (Federal Cases 9181), where the partnership estate not otherwise yielding anything for distribution, a creditor of one of the partners purchased a perfectly worthless partnership asset for $40.00 that he might put a fund into the hands of the assignee of the partnership and thereby prevent its creditors from sharing pari passu with individual creditors in individual assets. It is well observed by Judge Dayton that the present law received such careful consideration in its passage by a committee entirely familiar with the act of 1867, that it is impossible not to assume that its draft, which passed without amendment, was so worded as to exclude the possibility of any other distribution than that pointed out by the section. Reviewing the Janes Case,[84] Judge Lacombe uses this language: 'It was within the discretion of con-

[82] Citing Grosvenor v. Austins, 6 Ohio 103, 25 Am. Dec. 743; Brock v. Bateman, 25 Ohio St. 609; Rodgers v. Meranda, 7 Ohio St. 179.

[83] Citing In re Jewett, Fed. Cas. No. 7304; In re Knight, Fed. Cas. No. 7880, 2 Biss. 518.

[84] In re Janes, 133 Fed. 912, 67 C. C. A. 216, 13 Am. Bkr. R. 341.

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gress to leave this subject of the marshaling of assets to the courts, to be disposed of in accordance with equity principles and practice, or to provide that the general rule should be modified in particular cases. It has done neither. On the contrary, it has itself directed how the assets shall be marshaled, and it has done so in language broadly covering this case as well as all the others. The language is plain, explicit and unambiguous; it names no "exception"; its phraseology conveys no intimation that any "exception" is contemplated. To inject into the act an excepting clause where none has been enacted would seem to be judicial legislation.' An able opinion by a referee of the southern district of this state, denying the application of the exception, and reported in 12 American Bankruptcy Reports, 283, calls attention to the 'material change effected by the present law' from the act of 1867, 'in the manner in which a partnership is now regarded as a separate entity instead of a joint enterprise,' citing, to show 'that other courts have recognized material changes made by the present bankruptcy law'[85]—all to the point that, as distinguished from the law of 1867 the present act, 'deals with the copartnership as a person for the purpose of subjecting the partnership property to the satisfaction of the copartnership liabilities.' This significant change in phraseology from that of the former act may be sufficient to deprive the cases decided under the act of 1867 of persuasiveness. Indeed, it is difficult to see wherein the language of paragraph (f) of section 5 permits the grafting of an exception. The first sentence so definitely provides how various classes of debts shall be paid as to seem to leave no room for any variation. It reads: 'The net proceeds of the partnership property shall be appropriated for the payment of the partnership debts, and the net proceeds of the individual estate of each partner to the payment of his individual debts.' This language, read literally, excludes opportunity for the partnership

[85] *Vaccaro* v. Security Bank, 103 Fed. 436, 43 C. C. A. 279, 4 Am. Bkr. R. 474; In re Meyer (C. C. A., 2d Cir.) 98 Fed. 976. 39 C. C. A. 368, 3 Am. Bkr. R. 559; In re Stein, 127 Fed. 547, 62 C. C. A. 272, 11 Am. Bkr. R. 536.

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debts to participate in the fund derived from the individual estate of a partner, except as provided in the subsequent sentence of the paragraph, that is, only when the individual estate yields a surplus above the individual liabilities." The rule which does not recognize the exception is probably followed in the greater number of cases involving the question under the present act. If there are firm assets, but only enough to pay costs, with nothing left for distribution to firm creditors, it comes within the exception, it having been held that the term net proceeds, as used in the act, means proceeds distributed to creditors after costs of administration are paid.[86] Firm creditors may pay off separate creditors, and when this is done, or when there are no separate creditors, the firm creditors may then at once prove their claims against the separate estate.[87] Firm creditors may prove their claims against a bankrupt partner at once, but have only the right to vote until separate creditors are paid in full (subject to the exception above given).[88] The manner in which a separate partner secures his claim against his debtor's interest is not by proving against the firm, but by having his debtor's share in the partnership, if any, after payment of the partnership debts, turned over to the trustee of his debtor's estate, in order that it may be distributed in the same manner as any other assets, by that trustee.[89] The creditor of the individual estate has not the same interest in the firm estate that the firm creditor has in the individual estate, and can not vote in the election of a trustee for the firm.[90] Thus the peculiar situation may arise, where both the firm and the individual partner are declared bankrupt. that the firm creditors may join with the individual creditors in the election of a trustee of the property of the partner, while the partner's creditors may not join with the firm creditors in the selection of the firm trustee. This does not appear to be

[86] In re Litchfield, 5 Fed. 47.

[87] In re Day, 176 Fed. 377, 23 Am. Bkr. R. 785; Ex parte Tait, 16 Ves. 193.

[88] In re Webb, 4 Saw. (U. S.) 326, Fed. Cas. No. 17317; In re Beck, 110 Fed. 140, 6 Am. Bkr. R. 554; In re Diamond, 149 Fed. 407, 17 Am. Bkr. R. 563.

[89] B. A. 1898, sec. 58.

[90] In re Coe, 154 Fed. 162, 18 Am. Bkr. R. 715.

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wholly just, as the firm creditors might elect the trustees of both estates, and it would seem as important for the individual creditors as for the firm creditors to have a voice in the selection of a trustee of property in which they have a secondary interest, and it can even be seen that the trustees of the firm might elect a trustee of the property in which they have a secondary interest, who might not be the choice of the primary creditors. The authorities on this question are not unanimous, and it has been held that where a partner is adjudicated bankrupt, his individual creditors have priority over those of the firm, notwithstanding there are no firm assets.[91] Debts owing from a bankrupt partnership to a creditor and one owing from the creditor to an individual partner are not "mutual debts" which under section 68a may be set off against each other.[92]

§ 697. **Proof against both estates.**—There are many instances in which a debt may be proved against both estates. For instance, one of the partners succeeds to all the firm assets, and agrees to assume personally the firm liabilities. In such case, the remaining partner and the old firm are both liable primarily as far as the creditor is concerned (unless the creditor expressly release the retiring partner), and the creditor can prove against both estates at the same time,[93] but he can, of course, only secure the full amount of the debt, and no more, from one or both estates. There may be double proof on any obligation which is the joint and several obligation of the firm and of an individual partner,[94] as where a partnership signs notes, which are also signed or assumed by a partner individually,[95] or a judgment

[91] In re Wilcox, 94 Fed. 84.

[92] In re Neaderthal, 225 Fed. 38.

[93] In re Pease, Fed. Cas. No. 10881, 13 N. Bkr. R. 168.

[94] Mead v. Bank, 6 Blatchf. (U. S.) 180, Fed. Cas. No. 9366; In re Thomas, 8 Biss. (U. S.) 139, Fed Cas. No. 13886; Emery v. Canal Nat. Bank, 3 Cliff. (U. S.) 507, Fed. Cas. No. 4446; Reynolds v. New York Trust Co., 188 Fed. 611, 39 L. R. A. (N. S.) 391n; In re Coe, 169 Fed. 1002; In re Bigelow, Fed. Cas. No. 1397; In re McCallum, 11 Am. Bkr. R. 447. Compare In re Coe, 183 Fed. 745. Contra: In re Mosier, 7 Am. Bkr. R. 268.

[95] Buckingham v. First Nat. Bank, 131 Fed. 192, 65 C. C. A. 498. See In re McCoy, 150 Fed. 106.

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on a tort.[96] A partnership debt may be proved against the individual estate of a partner.[97]

§ 698. Proof between estates.—As a general rule, the separate estate of one partner can not claim against the joint estate of the partnership in competition with the joint creditors, nor shall the joint estate claim against the separate estate in competition with the separate creditors.[98] However, section 5g of the Bankruptcy Act provides that "the court may permit proof of the claim of the partnership estate against the individual estate and vice versa, and may marshal the assets of the partnership and individual estates so as to prevent preferences, and secure the equitable distribution of the property of the several estates." This is, however, discretionary with the court, and is had only by leave of court,[99] and does not affect the rights of firm creditors to be paid first out of firm assets, and of individual creditors to be paid first out of individual assets.[1] This clause is undoubtedly provided for the purpose of making plain the equity powers of the court to deal with fraudulent transfers and preferences between the firm and the members thereof,[2] but extends no further, and a partner who has advanced property to the firm is not entitled to participate in the firm assets in competition with creditors who are not partners, and vice versa.[3] The question arises as to the right of a partner to prove his separate claim against the estate of a bankrupt partner, in competition with nonpartner creditors. This, as a rule, is not allowed.[4] Mr.

[96] In re Coe, 183 Fed. 745, 26 Am. Bkr. R. 353; In re Peck, 206 N. Y. 55, 41 L. R. A. (N. S.) 1223.

[97] Loomis v. Wallblom, 94 Minn. 392, 102 N. W. 1114, 3 Ann. Cas. 798, 69 L. R. A. 771, note.

[98] Amsinck v. Bean, 22 Wall. (U. S.) 395, 22 L. ed. 801; Murrill v. Neil, 8 How. (U. S.) 414, 12 L. ed. 1135; Loveland on Bankruptcy, 4th ed., Vol. 1, p. 567.

[99] In re Union Bank, 184 Fed. 244, 25 Am. Bkr. R. 148.

[1] In re Union Bank, 184 Fed. 224. See also in re Denning, 114 Fed. 219; In re Filmar, 177 Fed. 170; In re Terens, 175 Fed. 495; In re Ervin, 109 Fed. 135 (affd. 112 Fed. 124, 50 C. C. A. 129).

[2] In re Union Bank, 184 Fed. 244, 25 Am. Bkr. R. 148; In re Terens, 175 Fed. 495, 23 Am. Bkr. R. 680.

[3] In re Union Bank, 184 Fed. 244, 25 Am. Bkr. R. 148.

[4] Amsinck v. Bean, 22 Wall. (U. S.) 395, 22 L. ed. 801.

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Loveland gives as a reason therefor, "that he is himself liable to all of the firm creditors, which is sufficient to show that in equity he can not be permitted to claim any part of the funds of the bankrupt before all the creditors to whom he is liable are paid."[5] Under this same reasoning, it is very probable that a special partner in a limited partnership would be permitted to compete with nonpartner creditors, inasmuch as he is under no liability for the payment of firm debts, except as to the amount he subscribes to the partnership. One or more solvent partners may wish to retain the credit of the firm, and may pay off the firm creditors. In such case they may prove against the bankrupt partner's estate for the amount the bankrupt partner should have paid, or may require of his solvent partners contribution, and all those so contributing may prove against the estate of the bankrupt partner or partners, for such amount as they may be entitled to from him thereby.[6]

§ 699. **Costs of partnership petition.**—Section 5e provides that the expenses shall be paid from the partnership property and the individual property in such proportions as the court shall determine. The question has arisen, as to whether a petition which involves the estates of individual partners as well as of the firm, should be considered, as to fees, one case or several. It is held that a voluntary petition of a firm in which individual partners join requires but one filing fee,[7] also that where partners file a partnership petition, it constitutes but one proceeding, and they can not each be required to pay separate filing fees, etc.[8]

§ 700. **Time within which firm may be adjudged.**—By the provisions of section 5a of the Bankruptcy Act, the adjudication may be either during the continuation of the partnership business, or after its dissolution and before the final settlement thereof. It is held[9] that there is no final settlement of a firm's business,

[5] Loveland Bankruptcy, page 568.

[6] In re Dillon, 100 Fed. 627, 4 Am. Bkr. R. 63; Ex parte Smith, Buck. 492.

[7] In re Gay, 98 Fed. 870.

[8] In re Langslow, 98 Fed. 869.

[9] In re Meyers, 96 Fed. 408; In re Levy, 95 Fed. 812. See Holmes v. Baker & Hamilton, 160 Fed. 922.

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so long as any of its debts remain unpaid, even though its assets have been absorbed by executions, and it has ceased to do business. This decision would practically make it possible to adjudge a partnership at any time after it commits an act of bankruptcy, and so long as there are any creditors of the firm. This statement should perhaps be qualified by the fact that the statute of limitations might be an effective bar, insomuch that, operating upon the claims of the creditors, it might make them unenforcible and uncollectible. The term creditors, at least insofar as it applies to involuntary proceedings, should undoubtedly be construed to mean all persons having enforcible claims against the alleged bankrupt. It should furthermore be considered that, by the provisions of section 5b, the petition against the alleged bankrupt must be filed within four months after the commission of the alleged act of bankruptcy.[10]

§ 701. **Acts of bankruptcy.**—A discussion of the matters which are designated as acts of bankruptcy belongs more properly to a work on bankruptcy than to one on partnership, inasmuch as they are general, and apply not only to partnerships but to others as well. However, in view of their importance and of the fact that they include partnerships, it may not be amiss to touch upon them in this connection. In the Bankruptcy Acts of 1898, the following pertinent provisions are found: Section 3a. "Acts of bankruptcy by a person shall consist of his having: (1) Conveyed, transferred, concealed, or removed, or permitted to be concealed or removed, any part of his property with intent to hinder, delay, or defraud his creditors, or any of them; or (2) transferred, while insolvent, any portion of his property to one or more of his creditors with intent to prefer such creditors over his other creditors; or (3) suffered or permitted, while insolvent, any creditor to obtain a preference through legal proceedings, and not having at least five days before a sale or final disposition of any property affected by such preference vacated or discharged

[10] See in re Pinson, 180 Fed. 787; C. A. 638; In re Hersch, 97 Fed. 571. Royston v. Wies, 112 Fed. 962, 50 C.

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such preference; or (4) made a general assignment for the benefit of his creditors, or, being insolvent, applied for a receiver or trustee for his property or because of insolvency a receiver or trustee has been put in charge of his property under the laws of a state, of a territory, or of the United States;[11] or (5) admitted in writing his inability to pay his debts and his willingness to be adjudged a bankrupt on that ground."[11a]

§ 702. Particular cases involving acts of bankruptcy by partnerships.—The written admission of one of two partners on behalf of both as a firm, that they are unable to pay their debts, and are willing to be adjudged bankrupt, constitutes an act of bankruptcy upon which they may be adjudicated as copartners individually and collectively.[12] Where a partner assigns the firm's assets, without objection on the part of his copartners, it is an act of bankruptcy as to such firm, and as to such individual assignor.[13] The question as to the meaning of the term "general assignment" in section 3a (4) of the Bankruptcy Act has been raised, and in one case[14] it has been held that a partnership's assignment is deemed "general" (and an act of bankruptcy), even though it does not cover the property of individual partners. Where the firm and each of its members make an assignment, the act of bankruptcy is committed by all; adjudication should embrace all.[15] It has been held that, under the provisions of section 3a (1) above, that the mere failure of surviving partners to contest the appointment of a partnership receiver is not equivalent to "concealment" or "removal" of property.[16] The preference of a firm creditor by a partner out of his own property, though his credit is the sole asset of the partnership, is held not to be an act of bankruptcy.[17]

[11] The above (No. 4) is not as originally passed in the Act of 1898, but as amended February 5th, 1903.

[11a] Bankr. Act 1898, § 3a.

[12] In re Kerstin, 110 Fed. 929.

[13] Chemical Nat. Bank v. Meyer, 92 Fed. 896.

[14] In re Meyer, 98 Fed. 976, 39 C. C. A. 368.

[15] Green River Bank v. Craig, 110 Fed. 137; In re Grant, 106 Fed. 496.

[16] Vaccaro v. Security Bank, 103 Fed. 436, 43 C. C. A. 279.

[17] Mills v. Fisher, 159 Fed. 897, 16

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§ 703. Place of commencing proceedings.—Section 2, clause 1, of the Act of 1898 provides that adjudication may be had of persons who have had their principal place of business, resided, or had their domicil within their respective territorial jurisdictions for the preceding six months, or the greater portion thereof, etc. A partnership, according to the rules hereinbefore discussed, would come within the above provision as would an individual. In case it should have its principal place of business for the six months preceding the commencing of the action in a certain judicial district, no question could arise but that the action is rightly commenced, as far as relates to place and if the firm has no place of business within a certain district, but one of the partners has his residence therein, the firm may be adjudicated by the court of that district under a proper showing, this being expressly provided for in section 5, clause c of the act. All the facts, however, necessary to confer jurisdiction must appear affirmatively and distinctly.[18] A question may be raised under section 5, clause c. Under the provision that jurisdiction of one partner gives jurisdiction of all partners and of the administration of the partnership and individual property, what jurisdiction does the court secure over the other partners and of their individual estates? The provision seems quite plain. It seems there is no extra-territorial jurisdiction as to persons who do not consent and submit to the court's jurisdiction, but a nonresident partner may be brought in by procedure under section 2, subdivision 6, of the Bankruptcy Act.[19] It is held that an involuntary petition against one partner confers no jurisdiction to adjudicate other partners in the same proceeding. This might seem to be in opposition to the plain provisions of the statute, but the statute refers to jurisdiction of the partners and the administration of the property both of the individual partners and of the firm. This, however, may be done without adjudicating the

L. R. A. (N. S.) 656, note; Hartman v. Peters, 146 Fed. 82; In re Stovall Grocery Co., 20 Am. Bkr. R. 537; In re Redmond, Fed. Cas. No. 11632.

[18] In re Plotke, 104 Fed. 964, 43 C. C. A. 282.

[19] Mahoney v. Ward, 100 Fed. 278; In re Schwartz, 30 Am. Bkr. R. 344.

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other partners bankrupt, which they may not be, although their firm and the resident partner may be, nevertheless their individual property is liable for the debts of the firm, if it does not pay out in full, and the court may enforce such liability, under the statute. This is further shown in a case[20] which holds that adjudication of a firm draws to the court for administration, the individual estates of the partners, and that the assignee for creditors of a partner may be compelled by summary order to surrender the property. It would appear that the court, in such a case would acquire jurisdiction to administer the individual property of the partner not directly brought in, so far as necessary for partnership purposes, but would not have jurisdiction to adjudge such partner a bankrupt alone upon the petition involving the other partner. Section 32 of the act of 1898 provides for the transfer of partnership and other cases, as follows: "In the event petitions are filed against the same person, or against different members of a partnership, each of which has jurisdiction, the cases shall be transferred, by order of the courts relinquishing jurisdiction, to and be consolidated by the one of such courts which can proceed with the same for the greatest convenience of parties in interest." This section authorizes transfer and consolidation in cases where different petitions are filed against a partnership,[21] and together with General Order VI, it applies where there is a voluntary petition in one district, and an involuntary petition in another.[22]

§ 704. **Exemptions in partnership proceedings.**—It has been held that a partnership engaged in farming is exempt from voluntary bankruptcy.[23] Section 6 provides that "this act shall not affect the allowance to bankrupts of the exemptions which are prescribed by the state laws in force at the time of the filing of the petition in the state wherein they have had their domicil for the six months or the greater portion thereof immediately

[20] In re Stokes, 106 Fed. 312.
[21] In re Sears, 112 Fed. 58.
[22] In re Waxelbaum, 98 Fed. 589.
[23] Stills v. American Nat. Bank, 209 Fed. 749.

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preceding the filing of the petition." This section recognizes the exemption laws of each state in actions brought therein, and neither enlarges nor diminishes such state's exemption laws.[24] Consequently, in such states as allow a waiver of exemptions by the debtor, such a waiver will be adhered to by the bankruptcy court, and no exemptions allowed, while the contrary rule applies where such waivers are not allowed.[25] As a general rule, partners are not entitled to exemptions in firm property and the federal courts so hold in states where this is the rule,[26] while they permit such exemptions in states where they are allowed.[27] Where the Uniform Partnership Act has been adopted there can be no right to exemptions in firm property.[28] It has been held that it is not a fraud on creditors where partners, though the firm is insolvent, but before action is brought, change the firm property into separate property by division among themselves in order to claim individual exemptions, and in such case exemptions are allowed.[29] The exemptions should be claimed, when the bankrupt's petition is filed,[30] but it may be done at any time while there are sufficient assets unadministered.[31] The specific property demanded should be set forth in the original or an amended schedule.[32] Some states give partners exemptions out of firm assets if the other partners consent. In the bankruptcy courts located within such states, these exemptions are recognized and applied, and the consent of each partner is shown if all the part-

[24] In re Woodard, 95 Fed. 260.

[25] In re Tune, 115 Fed. 906; In re Durham, 104 Fed. 231; In re Black, 104 Fed. 289; In re Garden, 93 Fed. 423.

[26] In re McCrary, 169 Fed. 485; In re Novak, 150 Fed. 602; In re Prince, 131 Fed. 546; In re Meriwether, 107 Fed. 102; In re Beauchamp, 101 Fed. 106; In re Mosier, 112 Fed. 138; In re Vickerman & Co., 29 Am. Bkr. R. 298; Jennings v. Stannus, 27 Am. Bkr. R. 384; Matter of Golden Rule Mercantile Co., 21 Am. Bkr. R. 397.

[27] In re Gartner Hancock Lumber Co., 173 Fed. 153; In re Friedrich, 100 Fed. 284, 40 C. C. A. 378; In re Stevenson, 93 Fed. 789; In re Camp, 91 Fed. 745; In re Andrews, 27 Am. Bkr. R. 116.

[28] Matter of Safady Bros., 36 Am. Bkr. R. 6. Uniform Partnership Act, § 25 (Wisconsin Act, § 21).

[29] Crawford v. Sternberg, 33 Am. Bkr. R. 677; Matter of McConnell, 32 Am. Bkr. R. 589.

[30] In re Friedrich, 100 Fed. 284, 40 C. C. A. 378.

[31] In re White, 103 Fed. 774.

[32] In re Duffy, 118 Fed. 926.

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ners join in the petition, and ask for exemptions.[33] It has been held in a case decided in the bankruptcy courts of Georgia, that each partner having no individual property is entitled, in adjudicating the bankrupt firm, in accordance with the exemption laws of Georgia, to exemptions out of the firm assets, provided his partnership interest equals such exemptions.[34] Much the same rule is applied in North Carolina and was applied in Wisconsin before adoption of the Uniform Partnership Act.[35] No general rule can be given in a general work as to what exemptions are allowed, owing to the various rules in different states, except that above given, that the bankruptcy courts will follow the exemption laws of the particular state in which the decision is given.

§ 705. Appointment and powers of trustee in partnership cases.—Trustees in partnership cases are appointed, or elected by the creditors entitled to vote.[36] However, this rule has been construed to the effect that the provision of the act that the "creditors of the partnership shall appoint the trustee," applies only in the case of a joint petition, and that in case of the separate bankruptcy of one of the members, separate creditors may vote, although all assets are partnership assets.[37] When the firm creditors have elected a trustee, he should administer both the property of the partnership and of each partner individually,[38] but each estate must be accounted for separately, inasmuch as each has its primary and its secondary creditors, and each requires a different distribution.[39] Every firm creditor is also a creditor of each separate partner, owing to the partner's liability for firm debts, hence the firm creditors are entitled to vote for a trustee of any individual partner, equally with the individual

[33] In re Mosier, 112 Fed. 138; In re Demarest, 110 Fed. 638; In re Steed, 107 Fed. 682.

[34] In re Camp, 91 Fed. 745.

[35] In re Duguid, 100 Fed. 274; In re Friedrich, 100 Fed. 284, 40 C. C. A. 378. Contra: Matter of Safady, 36 Am. Bkr. R. 6.

[36] Bankruptcy Act, § 5b.

[37] In re Beck, 110 Fed. 140, 6 Am. Bkr. R. 554.

[38] In re Coe, 154 Fed. 162, 18 Am. Bkr. R. 715. See Dickas v. Barnes, 140 Fed. 849, 72 C. C. A. 261, 5 L. R. A. (N. S.) 654. Bankruptcy Act, §§ 5d & 5f.

[39] In re Denning, 114 Fed. 219.

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creditors,[40] but such trustee has no authority over the property of the firm, taking only such property therein as may be turned over to him, upon settlement, as the partner whose estate he represents was entitled to from the partnership.[41] The court shall determine the relative proportion of the expenses of administering the various estates administered by the trustee in the same proceeding,[42] but where several partners file a partnership petition, it is but one proceeding, and separate filing fees can not be charged against each estate, and when the petition is filed for the firm and the individual partners join therein, the same rule applies.[44] Since the individual assets of each partner are subject to the payment of partnership liabilities, an order may be made for the trustee of the partnership to take possession of such assets, and administer them, unless by following regular procedure such partner is adjudicated a bankrupt, and his creditors elect a trustee. This is contemplated by section 5, and General Order VIII provides for it.[45]

§ 706. Discharge in partnership cases.—It is provided that "any person may, after the expiration of one month and within the next twelve months subsequent to being adjudged a bankrupt, file an application for a discharge in the court of bankruptcy in which the proceedings are pending; if it shall be made to appear to the judge that the bankrupt was unavoidably prevented from filing it within such time it may be filed within but not after the expiration of the next six months."[46] It has been repeatedly held that this provision applies to a partnership as well as individuals, and this though discharges are not granted the members of the firm.[47] This discharge does not, however, in

[40] In re Coe, 154 Fed. 162, 18 Am. Bkr. R. 715.

[41] Ex parte Tait, 16 Ves. 193. Bankruptcy Act, § 5e; In re Blumer, 12 Fed. 489. As to expenses generally, see in re City Contracting & Bldg. Co., 30 Am. Bkr. R. 133.

[42] In re Langslow, 98 Fed. 869.

[44] In re Gay, 98 Fed. 870.

[45] Matter of Hansley, 36 Am. Bkr. R. 1.

[46] Bankrutcy Act, § 14.

[47] In re Bertenshaw, 157 Fed. 363, 19 Am. Bkr. R. 577, 17 L. R. A. (N. S.) 886; In re Pincus, 147 Fed. 621, 17 Am. Bkr. R. 331; Strause v. Hooper, 105 Fed. 590, 5 Am. Bkr. R. 225.

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itself release the partners from their secondary liability for the partnership debts not paid, where the partners are not discharged individually.[48] The justice of this rule is manifest. As an example, there might be three persons engaged in a partnership, and both the firm and each partner become insolvent. The firm and two of the partners might be entitled to a discharge under the bankruptcy acts, while the third partner, in regard to his individual estate, may have done some act which would disentitle him to a discharge. He would, therefore, still be liable for firm debts (although possibly not collectible), while his copartners, and the firm itself may be discharged from liability. But the law seems to be that a court can not discharge the partnership without administering on the partner's separate estate.[49] Each individual member of a bankrupt partnership may separately apply for his discharge,[50] but must first be declared a bankrupt in that proceeding.[51] We have heretofore seen that each individual partner is individually liable for all the debts of the firm. If, therefore, one partner comes into the bankruptcy court individually, will his discharge operate to release him for his liability upon the firm obligations? Upon this point the decisions differ. The English rule, which is adopted by many American courts, and which is styled by Loveland in his work on Bankruptcy as "the true rule,"[52] and by Remington as the "true doctrine,"[53] holds that if a partner schedules the firm debts as well as individual debts and prays for a release therefrom, his discharge will release him from both such firm and individual debts.[54] "A full discharge of individual liability of one partner

[48] Abendroth v. Van Dolsen, 131 U. S. 66, 9 Sup. Ct. 619, 33 L. ed. 57. Compare Abbott v. Anderson, 265 Ill. 285, 106 N. E. 782, L. R. A. 1915 F, 668.

[49] Francis v. McNeal, 228 U. S. 695, 33 S. Ct. 701, L. R. A. 1915 E, 706.

[50] In re Hale, 107 Fed. 432; In re Meyers, 97 Fed. 757.

[51] In re Pincus, 147 Fed. 621, 17 Am. Bkr. R. 331.

[52] Loveland's Bankruptcy, 4th ed., p. 571.

[53] Remington Bankruptcy, 2 ed., § 2795.

[54] In re Kaufman, 136 Fed. 262, 14 Am. Bkr. R. 393; In re Brick, 4 Fed. 804; In re Webb, Fed. Cas. No. 17317, 4 Saw. (U. S.) 326; Loomis v. Wallblom (Minn.), 102 N. W. 1114, 69 L. R. A. 771; Berry v. Sheehan, 115 App. Div. (N. Y.) 488, 17 Am. Bkr. R. 322.

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on a firm debt may be had in bankruptcy proceedings concerning that partner only."[55] The contrary doctrine has been adhered to in not a few cases, the rule there being that in order to entitle the partner discharged to a release from the firm debts, there must have been an adjudication against the firm.[56] Mr. Loveland, in his work on Bankruptcy,[57] lays down the following rule, which perhaps covers the question as well as any: "In order that a discharge granted a partner upon his individual petition in bankruptcy may operate to release his partnership as well as his individual debts, the firm debts should be scheduled as partnership obligations, notice should be sent the firm creditors as such, the petition in bankruptcy and the application for discharge should show that the petitioner sought a discharge from firm as well as individual obligations, and notice of the proceedings should be given the remaining partners."[58] However, inasmuch as the question, when raised, has received different answers in our courts, it is perhaps the safer way, whenever practicable, to take steps to have the firm adjudicated as well as the individual partner, and thus to avoid any possible conflict of decisions. It was said on this subject in one case:[59] "There is some disagreement in the authorities as to whether a discharge of an individual partner releases him from liability upon partnership debts. The great weight of authority is in favor of the doctrine that the discharge of a partner on his individual petition operates as a release alike from his individual and his partnership indebtedness. The cases which hold to the contrary seem to be based upon a misconception of the extent of

[55] In re Kaufman, 136 Fed. 262. And compare In re McFaun, 96 Fed. 592; In re Laughlin, 96 Fed. 589; Loomis v. Wallblom, 94 Minn. 392, 102 N. W. 1114, 69 L. R. A. 771. See also Jarecki Mfg. Co. v. McElwaine, 107 Fed. 249; Dodge v. Kaufman, 46 Misc. 248, 91 N. Y. S. 727.

[56] In re Noonan, 3 Biss. (U. S.) 491, Fed. Cas. No. 10292, 10 Nat. Bkr. R. 330; In re Bidwell, Fed. Cas. No. 1392, 2 Nat. Bkr. Reg. 229; Dodge v. Kaufman, 46 Misc. 248, 91 N. Y. S. 727, 15 Am. Bkr. R. 542.

[57] Loveland Bankruptcy, 4th ed., p. 573.

[58] In re Morrison, 127 Fed. 186, 11 Am. Bkr. R. 498; In re Russell, 97 Fed. 32, 3 Am. Bkr. R. 91; In re Hartman, 96 Fed. 593, 3 Am. Bkr. R. 65.

[59] Jarecki Mfg. Co. v. McElwaine, 107 Fed. 249, 5 Am. Bkr. R. 751.

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the rights of a trustee over the bankrupt's estate, and as to the effect upon the firm of the bankruptcy of one of its members. The cases holding that discharge granted to one member of a firm does not release him from partnership indebtedness, where he alone is adjudged a bankrupt, proceed on the principle that the trustee could not acquire possession of and administer the assets of the firm. In so holding it seems to have been overlooked that the bankruptcy of one member is ipso facto a dissolution of the firm, and that, while the solvent partner would be allowed to administer the partnership assets, yet the trustee in bankruptcy is entitled to the bankrupt's share of the partnership assets after the payment of the partnership debts. The separate estate of the bankrupt partner, and his beneficial interest in the firm after the payment of firm debts, is to be administered by the trustee for the payment of the bankrupt's individual debts. The adjudication of one partner as a bankrupt brings within the jurisdiction of the court his entire estate for administration, and if, after the payment of his individual debts out of his individual estate, any surplus remains, it will be applicable to the payment of firm indebtedness. For the purpose of reaching any such surplus, firm creditors may prove against the estate of the bankrupt partner * * * and the discharge of one partner releases him from all partnership indebtedness. The provision of section 5, paragraph 'h' of the Act of 1898 that where one member of a firm, but not all, becomes bankrupt, the partners not adjudged bankrupt shall wind up the business and account to the trustee for the bankrupt's share in the firm, although it introduces no new rule of law, does, however, clearly show that all the bankrupt's property—his individual assets as well as his beneficial interest in the partnership assets—passes to the trustee. As that section provides a means for reaching this beneficial interest, there would seem to be no reason for refusing a bankrupt a discharge which will release him from his partnership liability on the ground that his partnership assets are not assigned to and controlled by his trustee, to be used for the benefit of the partnership creditors, because the trustee having a right

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to his beneficial interest in the partnership assets, and the bankrupt law providing a means for the collection of that interest, everything in which the partnership creditors might have a pecuniary interest passes to the trustee by virtue of the adjudication of the partner as a bankrupt. It would seem to be impossible to consider the provisions of section 5, paragraph 'h,' with the general intent of the law to release a bankrupt from all his indebtedness existing at the time of the commencement of the proceedings in bankruptcy, and especially with the provisions of section 16, providing that the release of the bankrupt by a discharge shall not alter the liability of a partner of the bankrupt, without reaching the conclusion that one member of a firm may be adjudged a bankrupt that the partnership creditors may prove their claims against his estate, and that a discharge granted to one member of a firm releases him from all partnership as well as individual indebtedness. And this result seems to be fortified by section 5, paragraph 'g' providing that the court may permit the proof of the claims of the partnership estate against the individual estate, and the individual estates so as to prevent preferences and secure an equitable distribution of the property of the several estates." By section 17 of the Bankruptcy Act a person is not released by a discharge, from debts created by his "fraud, embezzlement, misappropriation, or defalcation while acting as an officer or in any fiduciary capacity." Regarding the words "fiduciary capacity," it has been declared that they comprehend technical or express trusts and that they can not be extended to the relationship of principal and agent, broker and principal, or partner and copartner.[60]

§ 707. Misconduct of one partner as affecting innocent partner's right to discharge.—Section 14b of the Bankruptcy

[60] In re Camelo, 195 Fed. 632; In re Gulick, 186 Fed. 350; In re Basch, 97 Fed. 761; Ehrhart v. Rork, 114 Ill. App. 509; Karger v. Orth, 116 Minn. 124, 133 N. W. 471. See also Boyd v. Agricultural Ins. Co., 20 Colo. App. 28, 76 Pac. 986; Reeves v. McCracken, 73 N. J. 729, 69 Atl. 247; Clarke v. Milliken, 70 Misc. (N. Y.) 492, 127 N. Y. S. 339; Shipley v. Platts, 17 S. Dak. 357, 97 N. W. 1 (affd. 26 S. Dak. 57, 127 N. W. 470); Johnson's

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Act enumerates several acts which may prevent the granting of a discharge in bankruptcy, such as concealing books of account, or obtaining money upon a false statement in writing. It is generally held that the commission of such an act by one partner, is not a ground for refusing a discharge to the other partner who had no knowledge of the wrongdoing.[61] It was said in a leading case:[62] "The bankrupt Riess seems to have had no share in making the later 'short statement' relied upon by the objecting creditors; and they do not claim that he was personally concerned in the alleged fraud other than as a partner of Dresser. It is true that on principles of agency, Riess is liable civiliter for the fraudulent acts of Dresser which were clearly within the scope of the partnership business and for the firm's benefit. * * * The discharge in bankruptcy would not, therefore, affect a debt so created. The present act specifies, among nondischargeable debts, 'liabilities for obtaining property by false pretenses or false misrepresentations.'[63] But these considerations do not affect the right of an innocent partner to a discharge under section 14b, clause 3, of the amended Bankruptcy Act of February 5, 1903, chapter 487, section 4. The right to a discharge is distinct from the effect of a discharge. * * * It was held under the Act of 1867, which in section 33 provided that 'no debt created by fraud or embezzlement of the bankrupt

Admr. v. Parmenter, 74 Vt. 58, 52 Atl. 73. And compare Field v. Howry, 132 Mich. 687, 94 N. W. 213.

[61] Frank v. Michigan Paper Co., 179 Fed. 776, 30 L. R. A. (N. S.) 623; In re Schachter, 170 Fed. 683; Hardie v. Swafford Bros. Dry Goods Co., 165 Fed. 588, 20 L. R. A. (N. S.) 785n. See also In re Meyers, 105 Fed. 353; In re Gilpin, 160 Fed. 171; In re Garrison, 149 Fed. 178; In re Schultz, 109 Fed. 264; In re Hyman, 97 Fed. 195; In re Leavitt, Fed. Cas. No. 8169, 1 Hask. (U. S.) 194. In this connection it has been held that "a false representation by one partner, by means of which property was obtained by the partnership, will in law be imputed to the other partners to the extent of holding them civilly liable for the debt, and their discharge in bankruptcy will not discharge their liability as to such debt." Frank v. Michigan Paper Co., 179 Fed. 776, 103 C. C. A. 268.

[62] In re Dresser, 144 Fed. 318, 13 Am. Bkr. R. 616, 637 (affd. 145 Fed. 1021, 74 C. C. A. 680, 146 Fed. 383, 76 C. C. A. 655).

[63] Act July 1, 1898 (Bankruptcy Act), ch. 541, § 17a.

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shall be discharged,' that fraud as used in that section meant 'positive fraud in fact involving moral turpitude or intentional wrong, as does embezzlement, and not implied fraud, or fraud in law, which may exist without the imputations of bad faith or immorality. Such a construction of the statute is consonant with equity, and consistent with the object and intention of congress in enacting a general law by which the honest citizen may be relieved from the burden of hopeless insolvency. A different construction would be inconsistent with the liberal spirit which pervades the entire bankruptcy system.'[64] Therefore, although on principles of agency and partnership, a discharge may not relieve Riess from 'liabilities for obtaining property by false representations' (a question not to be decided here), it is considered that, not having himself participated in the making of the short statement relied on by the banks, the fraud of his partner can not, under these circumstances, be imputed to him, and his discharge can not, therefore, be refused." An individual partner may be discharged, although the partnership and remaining partners are not discharged.[65]

§ 708. Bankruptcy as dissolution of partnership.—Bankruptcy has been heretofore classified as one of the causes of dissolution of partnership,[66] but a brief discussion of the question may not be amiss at this place. It is a well recognized rule of the law of partnership, that a partnership is dissolved when it becomes bankrupt, and a valid assignment by a partnership of all the firm assets, except property exempt from execution, operates as a dissolution of the partnership.[67] It is equally true that the bankruptcy of one of the members of a partnership works a dissolution of the firm.[68] In some jurisdictions, however, the bankruptcy of one partner does not of itself necessarily dissolve the firm, but is a ground of dissolution which the other partners

[64] Neal v. Clark, 95 U. S. 704, 24 L. ed. 586.

[65] In re Meyers, 97 Fed. 757, 3 Am. Bkr. R. 260.

[66] Ante § 580.

[67] Wells v. Ellis, 68 Cal. 243, 9 Pac. 80; McKelvy's Appeal, 72 Pa. 409.

[68] Wells v. Ellis, 68 Cal. 243, 9 Pac. 80; Welles v. March, 30 N. Y. 344.

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may avail themselves of or not at their option.[69] There is, moreover, a general exception to the rule that bankruptcy of a partner dissolves the firm. It has been held that where one partner wishes to have the firm dissolved (possibly against the will of the other partners) and to accomplish this end has his partner adjudicated a bankrupt, no dissolution of the firm will be occasioned thereby.[70]

[69] Williston v. Camp, 9 Mont. 88, 22 Pac. 501.

[70] Amsinck v. Bean, 22 Wall. (U. S.) 395, 22 L. ed. 801.

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CHAPTER XXIII

ACTION FOR ACCOUNTING AND DISSOLUTION

SECTION
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§ 715. Action for accounting—In general.—A suit to dissolve a partnership and for an accounting is an equitable proceeding.[1] As a general rule, one partner has no right to sue another at law for a balance claimed to be due, until an accounting has been had.[2] The right to bring an action for an accounting upon

[1] Reese v. McCurdy, 121 Ala. 425, 25 So. 918; Smith v. Smith, 135 Ga. 582, 69 S. E. 1110; Huger v. Cunningham, 126 Ga. 684, 56 S. E. 64; Maynard v. Richards, 166 Ill. 466, 46 N. E. 1138, 57 Am. St. 145 (affg. 61 Ill. App. 336); Yergler v. Kaufman, 176 Ill. App. 563; Kisling v. Barrett, 34 Ind. App. 304, 71 N. E. 507; Boimare v. St. Geme, 113 La. 830, 37 So. 770; Bruns v. Heise, 101 Md. 163, 60 Atl. 604; Lovejoy v. Bailey, 214 Mass. 134, 101 N. E. 63; Robinson v. McGinty, 84 App. Div. 639, 82 N. Y. S. 736; Hutchinson v. Sperry, 158 App. Div. 704, 143 N. Y. S. 876 (revg. judgment 140 N. Y. S. 220, 79 Misc. 523); Daniel v. Gillespie, 65 W. Va. 366, 64 S. E. 254; Gates v. Paul, 117 Wis. 170, 94 N. W. 55; Zimmerman v. Chambers, 79 Wis. 20, 47 N. W. 947; Eng. Partn. Act (1890), § 39; Airey v. Borham, 29 Beav. 620, 4 L. T. Rep. (N. S.) 391; Tupper v. Annand, 16 Can. Sup. Ct. 718.

[2] Newman v. Tichenor, 88 Ill. App. 1; Bogardus v. Reed, 160 App. Div. 294, 145 N. Y. S. 597; Head v. King, 33 Misc. 89, 67 N. Y. S. 141; Barber v. Morgan (Tex. Civ. App.), 76 S. W. 319; Brierly v. Cripps, 7 C. & P.

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dissolution belongs to any partner, or his personal representative,[3] though it has been held it may be lost by culpable negligence,[4] and as a general rule an accounting can not be had in other litigation between partners,[5] nor without a dissolution.[6] Fraudulent misconduct of a partner or breach of a partnership agreement or duty arising from the relation, are grounds for a dissolution and accounting,[7] as where one partner takes a renewal of a lease in his own name;[8] or where some of the partners organized a corporation and wrongfully took over the

709, 32 E. C. L. 833; Richardson v. Bank of England, 2 Jur. 911, 8 L. J. Ch. 1. See Martin v. Seabaugh, 128 La. 442, 54 So. 935.

[3] Pearce v. Sutherland, 164 Fed. 609, 90 C. C. A. 519; Green v. Hart, 87 S. W. 315, 27 Ky. L. 970; Groth v. Payment, 79 Mich. 290, 44 N. W. 611; Sterling v. Chapin, 102 App. Div. 589, 92 N. Y. S. 904; Betjemann v. Betjemann [1895], 2 Ch. 474, 64 L. J. Ch. 641; Doupe v. Stewart, 13 Grant Ch. (U. C.) 637; Eng. Partnership Act (1890), § 39.

[4] Garnett v. Wills, 69 S. W. 695, 24 Ky. L. 617; Lamb v. Rowan, 83 Miss. 45, 35 So. 427, 690; Eyre v. Lesher, 14 Montg. Co. Rep. (Pa.) 189; Heffernan v. Sheridan, 11 Quebec K. B. 3.

[5] Beardslee v. Citizens' Commercial &c. Bank, 112 Mich. 377, 70 N. W. 1027; Scott v. Buffum, 52 N. H. 345; Santleben v. Froboese, 17 Tex. Civ. App. 626, 43 S. W. 571; Rommerdahl v. Jackson, 102 Wis. 444, 78 N. W. 742. See Hatch v. Fritz, 48 Colo. 530, 111 Pac. 74; Yergler v. Kaufmann, 176 Ill. App. 563.

[6] Lord v. Hull, 178 N. Y. 9, 70 N. E. 69, 102 Am. St. 484. See, however, Hudson v. Barrett, 1 Pars. Eq. Cas. (Pa.) 414.

[7] Oteri v. Scalzo, 145 U. S. 578, 36 L. ed. 824, 12 Sup. Ct. 895; Pearce v. Sutherland, 164 Fed. 609, 90 C. C. A. 519; Cottle v. Leitch, 35 Cal. 434; Hanna v. McLaughlin, 158 Ind. 292, 63 N. E. 475; Smith v. Everett, 126 Mass. 304; Wachter v. Heman, 82 Mo. App. 243; Wittingham v. Darrin, 45 Misc. 478, 92 N. Y. S. 752; Stibich v. Goenner, 8 Pa. Dist. 227; Holder v. Shelby (Tex. Civ. App.), 118 S. W. 590; Newton v. Doran, 1 Grant. Ch. (U. C.) 590; Whimbey v. Clark, 22 Quebec Super Ct. 453. Where a husband pledged his wife's jewelry to secure a loan, and agreed with pledgee's assignee that profits of a business were to be divided between him and the assignee, his share to be applied on the loan, it was held that the wife and the husband's assignee could maintain a bill for an accounting; the right of action not being one of simple contract, which should be brought in a court of law, but one which involved a quasi partnership relation. Campbell v. Burnett, 120 Md. 214, 87 Atl. 894.

[8] Lurie v. Pinanski, 215 Mass. 229, 102 N. E. 629.

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partnership property;[9] or where a partner refuses to account for firm property;[10] or defrauds another by false entries;[11] or the partnership has accomplished its purpose and one partner has the entire assets in his possession and is about to dispose of them.[12] A fiscal agent of a partnership which had separated into two groups, was held bound to account at the suit of either group.[13] Dissensions between partners sufficient to prevent successful and harmonious conduct of the business are a ground for dissolution.[14] After dissolution any partner has a right to an accounting,[15] and such a suit may be brought when a partner fails to account,[16] wrongfully withholds firm property,[17] or has

[9] Freeman v. Lowell Specialty Co., 174 Mich. 59, 140 N. W. 572.

[10] Hanna v. McLaughlin, 158 Ind. 292, 63 N. E. 475.

[11] Cottle v. Leitch, 35 Cal. 434; Frankfort Construction Co. v. Meneely, — Ind. App. — (decided Apr. 20, 1916).

[12] Thomas v. Hollingsworth, 181 Ind. 411, 103 N. E. 840.

[13] Forcheimer v. Foster (Ala.), 68 So. 879.

[14] Reid v. Freed, 100 Miss. 48, 56 So. 278; News-Register Co. v. Rockingham Pub. Co. (Va.), 86 S. E. 874.

[15] Brew v. Cochran, 141 Fed. 459; Spear v. Newell, 2 Paine (N. S.) 267, Fed. Cas. No. 13224; Crouse v. McCandless, 121 Ill. App. 237; Bradley v. Webb, 53 Maine 462; Stevens v. Yeatman, 19 Md. 480; Dye v. Bowling, 82 Mo. App. 587; Schulsinger v. Blau, 84 App. Div. 390, 82 N. Y. S. 686; Burkardt v. Walsh, 49 App. Div. 634, 64 N. Y. S. 779; Goodfellow v. Kelsey, 21 S. Dak. 247, 111 N. W. 555; Knapp v. Edwards, 57 Wis. 191, 15 N. W. 140; Cruikshank v. McVicar, 8 Beav. 106, 14 L. J. Ch. 41, 50 Eng. Reprint 42; Habershon v. Blurton, 1 DeG. & Sm. 121, 63 Eng. Reprint 998. See Adams v. Carmony, 44 Ind. App. 291, 87 N. E. 708, 89 N. E. 327; Webb v. Butler (Ala.), 68 So. 369; Moore v. Rawson, 199 Mass. 493, 85 N. E. 586; Hoffman v. Hauptner, 135 App. Div. 148, 119 N. Y. S. 1022; Townsend v. Meyers, 123 N. Y. S. 1075.

[16] Miller v. Jones, 39 Ill. 54; Frederick v. Cooper, 3 Iowa 171; Tenney v. Simpson, 37 Kans. 579, 15 Pac. 512; Thompson v. Walker, 40 La. Ann. 676, 4 So. 881; Tannenbaum v. Armeny, 81 Hun 581, 31 N. Y. S. 55, 63 N. Y. St. 348; Kent v. Norcross, 9 Pa. Dist. 754; Hue v. Richards, 2 Beav. 305, 17 Eng. Ch. 305, 48 Eng. Reprint 1198. See Fried v. Burk, 125 Md. 500, 94 Atl. 86; Orr v. Cooledge, 117 Ga. 195, 43 S. E. 527; Child v. O'Rourke, 122 App. Div. 325, 106 N. Y. S. 884.

[17] Costley v. Towles, 46 Ala. 660; Tarabino v. Nicoli, 5 Colo. App. 545, 39 Pac. 362; Hanna v. McLaughlin, 158 Ind. 292, 63 N. E. 475; Simpson v. Tenney, 41 Kans. 561, 21 Pac. 634; Reed v. Snell, 36 Nebr. 815, 55 N. W. 249; Morrill v. Weeks, 70 N. H. 178, 46 Atl. 32; Dignan v. Dignan (N. J. Eq.), 14 Atl. 887; Holladay v. Elliott, 3 Ore. 340; McCartney v. Boyd (Wis.), 152 N. W. 820; Le-

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wrongfully excluded the others from the business.[18] If no private accounting has taken place, dissolution always gives any partner a right to a judicial accounting.[19] Demand for an accounting is not necessary before suit.[20] A mother, in partnership with her son, who during a certain period received only five thousand dollars from the business, while he received twenty-three thousand dollars, and to whom, on purchase of her interest by him, no definite account of the business was furnished, was entitled to an accounting of the partnership affairs.[21] A creditor of a partner has no right to an accounting, unless he has purchased his interest, or secured a lien on it.[22] If there has been fraud in a private settlement, it is not necessary to rescind the contract before the defrauded partner brings an action for judicial accounting.[23] The partnership articles may mention grounds entitling one partner to purchase all the firm assets, as on a final disagreement.[24]

§ 716. **Form of remedy and jurisdiction.**—The ordinary and usual method of bringing about a judicial accounting is by the institution of a suit in equity, since the powers of a court of law are usually held inadequate to an accounting.[25] Equity

febvre v. Aubry, 26 Can. Sup. Ct. 602; Aldecoa v. Warner, 16 Philippine 423.

[18] McCabe v. Sinclair, 66 N. J. Eq. 24, 58 Atl. 412; Wilcox v. Pratt, 125 N. Y. 688, 25 N. E. 1091, 3 Silv. Ct. App. 199 (affg. 52 Hun 340, 5 N. Y. S. 361, 23 N. Y. St. 686); Green v. Tuchner, 87 App. Div. 314, 84 N. Y. S. 345. See Grafton v. Paine, 7 App. (D. C.) 255.

[19] Hanna v. McLaughlin, 158 Ind. 292, 63 N. E. 475; Woodman v. Toye, 204 Mass. 265, 90 N. E. 570; McClung v. Capehart, 24 Minn. 17; Deveney v. Mahoney, 23 N. J. Eq. 247; Stibich v. Goenner, 8 Pa. Dist. 227.

[20] Cottle v. Leitch, 35 Cal. 434; Hanna v. McLaughlin, 158 Ind. 292, 63 N. E. 475; McClung v. Capehart, 24 Minn. 17.

[21] Styles v. Shaver, 151 App. Div. 903, 136 N. Y. S. 347.

[22] Henderson v. Farley Nat. Bank, 123 Ala. 547, 26 So. 226, 82 Am. St. 140; Miller v. Brigham, 50 Cal. 615; Lincoln Sav. Bank v. Gray, 12 Lea. (Tenn.) 459.

[23] Richards v. Fraser, 122 Cal. 456, 55 Pac. 246; Wallace v. Sisson, 98 Cal. xviii, 33 Pac. 496 (1893); Cottle v. Leitch, 35 Cal. 434; Oliver v. House, 125 Ga. 637, 54 S. E. 732; Zimmerman v. Chambers, 79 Wis. 20, 47 N. W. 947. Compare Staiger v. Klitz, 129 App. Div. 703, 114 N. Y. S. 486.

[24] Phillips v. Crownfield, 124 Md. App. 443, 92 Atl. 1030.

[25] Oteri v. Scalzo, 145 U. S. 578,

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will force an accounting though the accounts are not complicated.[26] In some jurisdictions the common-law action of account has been used, where a partnership consisted of two members,[27] the jurisdiction being in equity where there are more than two members, for the reason that the rights and liabilities of the partners are several, not joint, and two or more partners could not be joined as parties,[28] but as this is merely a distinction as to a remedy and not as to a right, some statutes permit the common-law action of account where there are more

36 L. ed. 824, 12 Sup. Ct. 895; Ivinson v. Hutton, 98 U. S. 79, 25 L. ed. 66; Monroe v. Hamilton, 47 Ala. 217; Barnstead v. Empire Min. Co., 5 Cal. 299; Gillett v. Hall, 13 Conn. 426; Printup v. Fort, 40 Ga. 276; Bracken v. Kennedy, 4 Ill. 558; Aldrich v. Mathias, 167 Ill. App. 589; Horn v. Lupton, 182 Ind. 355, 105 N. E. 237, 106 N. E. 708; Lesh v. Bailey, 49 Ind. App. 254, 95 N. E. 341; Kisling v. Barrett, 34 Ind. App. 304, 71 N. E. 507; Neal v. Keel, 4 T. B. Mon. (Ky.) 162; Atkinson v. Rogers, 14 La. Ann. 633; Corner v. Gilman, 53 Md. 364; Perrin v. Lepper, 72 Mich. 454, 40 N. W. 859; Converse v. Hobbs, 64 N. H. 42, 5 Atl. 832; Lilliendahl v. Stegmair, 45 N. J. Eq. 648, 18 Atl. 216; Kirkwood v. Smith, 47 Misc. 301, 95 N. Y. S. 926 (affd. 111 App. Div. 923, 96 N. Y. S. 1132); Watts v. Adler, 47 Hun 634, 13 N. Y. St. 553; Rickey v. Bowne, 18 Johns (N. Y.) 131; Ainey's Appeal, 2 Penny. (Pa.) 192; Stevens v. Coburn, 71 Vt. 261, 44 Atl. 354; Spear v. Newell, 13 Vt. 288; Jones v. Murphy, 93 Va. 214, 24 S. E. 825; Foster v. Donald, 1 Jac. & W. 252, 21 Rev. Rep. 157, 37 Eng. Reprint 371; Good v. Blewitt, 19 Ves. Jr. 336, 34 Eng. Reprint 542; Toulmin v. Copland, 3 Y. & C. Exch. 625. See Northen v. Tatum, 164 Ala. 368, 51 So. 17; Aldrich v. Mathias, 167 Ill. App. 589; Heck v. Collins, 231 Pa. 357, 80 Atl. 53; Schmidt v. Mertes, 145 Wis. 468, 130 N. W. 474.

[26] Webb v. Butler (Ala.), 68 So. 369.

[27] Porter v. Bichard, 1 Ariz. 87, 25 Pac. 530; Beach v. Hotchkiss, 2 Conn. 425; Clarke v. Mills, 36 Kans. 393, 13 Pac. 569; Wilhelm v. Caylor, 32 Md. 151; Fowle v. Kirkland, 18 Pick. (Mass.) 299; Lesley v. Rosson, 39 Miss. 368, 77 Am. Dec. 679; Dorwart v. Ball, 71 Nebr. 173, 98 N. W. 652; Appleby v. Brown, 24 N. Y. 143, 23 How. Pr. 207; McMurray v. Rawson, 3 Hill (N. Y.) 59; Jacobs v. Fountain, 19 Wend. (N. Y.) 121; Kutz v. Dreibelbis, 126 Pa. St. 335, 17 Atl. 609; Stevens v. Coburn, 71 Vt. 261, 44 Atl. 354; Foster v. Ives, 53 Vt. 458; Newell v. Humphrey, 37 Vt. 265; Wiswell v. Wilkins, 4 Vt. 137.

[28] Beach v. Hotchkiss, 2 Conn. 425; Horn v. Lupton, 182 Ind. 355, 105 N. E. 237, 106 N. E. 708; Farrar v. Pearson, 59 Maine 561, 8 Am. Rep. 439; Appleby v. Brown, 24 N. Y. 143, 23 How. Pr. 207; Stevens v. Coburn, 71 Vt. 261, 44 Atl. 354.

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than two partners,[29] and the action of assumpsit will occasionally lie between partners upon single items connected with the partnership.[30] Surviving partners have been compelled to account on the theory that they were quasi-trustees to the deceased partner's personal representative, without reference to the ordinary doctrine of accounting.[31] Where the partnership has been fully dissolved by written contract and the rights of each party definitely established, in case of a breach of such contract equity will not order an accounting, as the remedy is at law.[32] The general rule is that equity has exclusive jurisdiction of suits for dissolution and settlement of partnerships,[33] even under most codes and statutes,[34] though a few states confer by statute juris-

[29] Stevens v. Coburn, 71 Vt. 261, 44 Atl. 354; Park v. McGowen, 64 Vt. 173, 23 Atl. 855; Foster v. Ives, 53 Vt. 458; Hydeville Co. v. Barnes, 37 Vt. 588; Duryea v. Whitcomb, 31 Vt. 395; Green v. Chapman, 27 Vt. 236.

[30] Rotramel v. Ford, 169 Ill. App. 7; Pfeiffer v. Bauer, 122 Ill. App. 625; Pettingill v. Jones, 28 Kans. 749; Pray v. Mitchell, 60 Maine 430; Fanning v. Chadwick, 3 Pick. (Mass.) 420, 15 Am. Dec. 233; Brewer v. Swartz, 83 Mo. App. 451; Galbreath v. Moore, 2 Watts (Pa.) 86; Way v. Milestone, 2 H. & H. 32, 3 Jur. 727; Rackstraw v. Imber, Holt N. P. 368, 3 E. C. L. 149; Foster v. Allanson, 2 T. R. 479. See especially Holmes v. Hunt, 122 Mass. 505, 23 Am. Rep. 381.

[31] Fried v. Burk, 125 Md. 500, 94 Atl. 86.

[32] Rotramel v. Ford, 169 Ill. App. 7.

[33] Esterly v. Rua, 122 Fed. 609, 58 C. C. A. 548; Dugger v. Tutwiler, 129 Ala. 258, 30 So. 91; Luke v. Rhodes (Ark.), 176 S. W. 111; Choate v. O'Neal, 57 Ark. 299, 21 S. W. 470; Andrade v. San Francisco Superior Court, 75 Cal. 459, 17 Pac. 531; Kayser v. Maugham, 8 Colo. 232, 6 Pac. 803; Niles v. Williams, 24 Conn. 279; Allen v. Hawley, 6 Fla. 142, 63 Am. Dec. 198; Epping v. Aiken, 71 Ga. 682; Aram v. Edwards, 9 Idaho 333, 74 Pac. 961; Strong v. Clawson, 10 Ill. 346; Frederick v. Cooper, 3 Iowa 171; Carter v. Christie, 57 Kans. 492, 46 Pac. 964; Gordon v. Dick, 15 La. 33; White v. White, 169 Mass. 52, 47 N. E. 499; Torbert v. Jeffrey, 161 Mo. 645, 61 S. W. 823; Lenahan v. Casey, 46 Mont. 367, 128 Pac. 601; Kennett v. Hopkins, 175 N. Y. 496, 174 N. Y. 545, 67 N. E. 1084 (affg. 58 App. Div. 407, 69 N. Y. S. 18); Simpson v. Simpson, 44 App. Div. 492, 60 N. Y. S. 879; Gleason v. Van Aernam, 9 Ore. 343; Wiley's Appeal, 84 Pa. St. 270; Taylor v. Holman, 1 Mill Const. (S. Car.) 172; Daniel v. Gillespie, 65 W. Va. 366, 64 S. E. 254; Maunder v. Lloyd, 2 Johns. & H. 718, 1 New Rep. 123; Eng. Jud. Act (1873), § 34.

[34] Choate v. O'Neal, 57 Ark. 299, 21 S. W. 470; King v. White, 63 Vt.

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diction of partnership dissolutions on probate courts.[35] The venue of actions for accounting is governed by the rules relative to the venue of other actions between partners; that is, the action should generally be brought in the county where the parties reside, without reference to the location of the assets.[36]

§ 717. **Defenses.**—The right to an accounting may be barred by a full and complete private settlement of all partnership matters,[37] especially if the plaintiff partner afterward ratified such settlement by his acts.[38] Such right may be lost by misconduct of the plaintiff partner.[39] Settlement by arbitration is also a good defense in a suit for a partnership accounting,[40] but neither a partial settlement,[41] nor a failure of the plaintiff partner to perform his partnership obligations under the agreement,[42] nor the fact that there is no balance due the plaintiff

158, 21 Atl. 535, 25 Am. St. 752; Foster v. Ives, 53 Vt. 458; Kendrick v. Tarbell, 27 Vt. 512.

[35] Harrah v. State, 38 Ind. App. 495, 76 N. E. 443, 77 N. E. 747; Caldwell v. Hawkins, 73 Mo. 450; Ensworth v. Curd, 68 Mo. 282; In re Unruh's Estate, 13 Phila. (Pa.) 337.

[36] Clark v. Brown, 83 Cal. 181, 23 Pac. 289 (applying Code Civ. Proc., § 392); Cox v. Manning, 13 Ga. App. 518, 79 S. E. 484; Quinn v. McMahan, 40 Ill. App. 593; Lobdell v. Bushnell, 24 La. Ann. 295; Brinegar v. Griffin, 2 La. Ann. 154; Godfrey v. White, 43 Mich. 171, 5 N. W. 243; Williams v. Williams, 83 Misc. 560, 145 N. Y. S. 564; Chappell v. Chappell, 125 App. Div. 127, 109 N. Y. S. 648; Falls of Nense Mfg. Co. v. Brower, 105 N. Car. 440, 11 S. E. 313; Morris v. Nunn, 79 Tex. 125, 15 S. W. 220.

[37] Burks v. Parker (Ala.), 68 So. 271; Cayton v. Walker, 10 Cal. 450; Durham v. Edwards, 50 Fla. 495, 38 So. 926; Iredell's Appeal, 10 Pa. Cas. 127, 13 Atl. 752; Brenner v. Brenner, 9 Pa. Dist. 511; Chapman v. Chapman, 13 R. I. 680; Burke v. Parke, 5 W. Va. 122. See Aldecoa v. Warner, 16 Philippine 423.

[38] Spratt v. Dwyer (Iowa), 151 N. W. 474.

[39] Gassie's Succession, 42 La. Ann. 239, 7 So. 454; Kinney v. Robinson, 66 Mich. 113, 33 N. W. 172; Hart v. Deitrich, 69 Nebr. 685, 96 N. W. 144; Quinn v. Quinn, 8 Del. Co. (Pa.) 257; Bradly v. Jennings, 201 Pa. 473, 51 Atl. 343; Ryman v. Ryman, 100 Va. 20, 40 S. E. 96.

[40] Yates v. Petty, 1 Harr. & J. (Md.) 58; Richardson v. Huggins, 23 N. H. 106; Tittenson v. Peat, 3 Atk. 530.

[41] Harris v. Harris, 132 Ala. 208, 31 So. 355; Parsons v. Jennings, 71 Conn. 494, 42 Atl. 630; Raymond v. Vaughan, 128 Ill. 256, 21 N. E. 566, 4 L. R. A. 440, 15 Am. St. 112 (affg. 17 Ill. App. 144); Aldecoa v. Warner, 16 Philippine 423.

[42] Boyd v. Mynatt, 4 Ala. 79; Pal-

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from the defendant,[43] are defenses to a suit for an accounting. An accounting will not be granted if the party asking therefor has no real cause of complaint, and no good purpose would be accomplished by it,[44] or where the court has no satisfactory means of ascertaining the rights of the partners.[44a] The alleged active partner who asks an accounting, but who can show no records of transactions, has been held not entitled to such remedy.[45] The fact that one partner invested money in the partnership to defeat his creditors does not prevent a partition and accounting from the other partner.[46] If a partnership contract was not entered into for a fraudulent, wrongful, or unlawful purpose, it has been held that fraud practiced in obtaining quitclaim deeds from heirs of an estate is not a defense to an action for an accounting between the partners.[47] And it has been held that liability to an account for profits in the sale of property, can not be excused because made by breach of the defendant partner's fiduciary relation to the purchaser,[48] nor where one partner was intending to defraud the government.[49]

§ 718. Time to sue and limitation of actions.—The general rule is that an action for accounting may be brought immediately after dissolution of the partnership.[50] The statute of limitations applies to equitable actions between partners for an

mer v. Tyler, 15 Minn. 106; Clarke v. Hart, 6 H. L. Cas. 633; In re Shadwell Water Works Co., 18 Wkly. Rep. 160.

[43] Sharp v. Hibbins, 42 N. J. Eq. 543, 9 Atl. 113; Smith v. Fitchett, 56 Hun 473, 10 N. Y. S. 459, 31 N. Y. St. 606; Martin v. Smith, 53 N. Y. Super. Ct. 277.

[44] Warburton v. Davis, 123 Md. 225, 91 Atl. 163.

[44a] Hinkson v. Ervin, 40 W. Va. 111, 20 S. E. 849. Compare Reis v. Reis, 99 Minn. 446, 109 N. W. 997.

[45] Ryman v. Ryman, 100 Va. 20, 40 S. E. 96.

[46] Freidenbloom v. McAfee (Tex.), 167 S. W. 28.

[47] Folsom v. Fernstrom, 43 Utah 432, 134 Pac. 1021.

[48] Spencer v. Barnes, 25 Cal. App. 139, 142 Pac. 1088.

[49] Blalock v. Copeland, 65 S. W. 349, 23 Ky. L. 1455.

[50] Walsh v. McKeen, 75 Cal. 519, 17 Pac. 673; Bonney v. Stoughton, 122 Ill. 536, 13 N. E. 833; Thomas v. Hollingsworth, 181 Ind. 411, 103 N. E. 840; Adams v. Carmony, 44 Ind. App. 291, 87 N. E. 708; Foster v. Rison, 17 Grat. (Va.) 321.

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accounting,[51] and generally speaking, it begins to run at the date of the maturity of the cause of action sued on,[52] and does not run before dissolution upon an action brought after dissolution.[53] But as to the exact time after dissolution when the

[51] Campbell v. Clark, 101 Fed. 972, 42 C. C. A. 123; Bradford v. Spyker, 32 Ala. 134; Adams v. Taylor, 14 Ark. 62; Flynn v. Seale, 2 Cal. App. 665, 84 Pac. 263; Reynolds v. Reynolds, 186 Ill. App. 397; McKaig v. Hebb, 42 Md. 227; Wilhelm v. Caylor, 32 Md. 151; Currier v. Studley, 159 Mass. 17, 33 N. E. 709; Farnam v. Brooks, 9 Pick. (Mass.) 212; Burditt v. Grew, 8 Pick. (Mass.) 108; Dowse v. Gaynor, 155 Mich. 38, 118 N. W. 615; Jenny v. Perkins, 17 Mich. 28; Prewett v. Buckingham, 28 Miss. 92; Coudrey v. Gilliam, 60 Mo. 86; Cowart v. Perrine, 18 N. J. Eq. 454; Atwater v. Fowler, 1 Edw. Ch. (N. Y.) 417; Gray v. Kerr, 46 Ohio St. 652, 23 N. E. 136; Boyd v. Munro, 32 S. Car. 249, 10 S. E. 963; Montgomery v. Montgomery, Rich. Eq. Cas. (S. Car.) 64; Knox v. Gye, L. R. 5 H. L. 656, 42 L. J. Ch. 234; Bridges v. Mitchell, Gilb. 224, 25 Eng. Reprint 156; Kline v. Kline, 3 Ch. Chamb. (U. C.) 161; Carroll v. Eccles, 17 Grant Ch. (U. C.) 529.

[52] Cary v. Simmons, 87 Ala. 524, 6 So. 416; Flynn v. Seale, 2 Cal. App. 665, 84 Pac. 263; Lendholm v. Bailey, 16 Colo. App. 190, 64 Pac. 586; Hellenbrand v. Bates, 56 S. W. 418, 21 Ky. L. 1759; Parker's Succession, 17 La. Ann. 28; King v. Wartelle, 14 La. Ann. 740; McClung v. Capehart, 24 Minn. 17; Fellowes v. Johnson, 91 App. Div. 611, 86 N. Y. S. 436; Didier v. Davison, 2 Barb. Ch. (N. Y.) 477; Gray v. Kerr, 46 Ohio St. 652, 23 N. E. 136; Jones v. Jones, 10 Ohio Cir. Dec. 71; 18 Ohio Cir. Ct. 260; Brew v. Hastings, 206 Pa. 155, 55 Atl. 922; Garretson v. Brown, 185 Pa. St. 447, 40 Atl. 293; McPherson v. Swift, 22 S. Dak. 165, 116 N. W. 76, 133 Am. St. 907; Peel v. Giesen, 21 Tex. Civ. App. 334, 51 S. W. 44; Knox v. Gye, L. R. 5 H. L. 656; Noyes v. Crawley, 10 Ch. D. 31, 48 L. J. Ch. 112; Watson v. Woodman, L. R. 20 Eq. 721, 45 L. J. Ch 57; Whitley v. Lowe, 2 De G. & J. 704, 4 Jur. (N. S.) 815; Tatam v. Williams, 3 Hare 347, 25 Eng. Ch. 347; Taylor v. Taylor, 28 L. T. Rep. (N. S.) 188; Eng. Partn. Act (1890), § 43.

[53] Horne v. Ingraham, 125 Ill. 198, 16 N. E. 868; Askew v. Springer, 111 Ill. 662; Petty v. Haas, 122 Iowa 257, 98 N. W. 104; Eddy v. Fogg, 192 Mass. 543, 78 N. E. 549. See also Farnam v. Brooks, 9 Pick. (Mass.) 212; McMahon v. Brown, 219 Mass. 23, 106 N. E. 576; Broderick v. Beaupre, 40 Minn. 379, 42 N. W. 83; Vaiden v. Hawkins (Miss.), 6 So. 227 (1889); Beller v. Murphy, 139 Mo. App. 663, 123 S. W. 1029; Hutchinson v. Sperry, 158 App. Div. 704, 143 N. Y. S. 876; Clinton Loan Assoc. v. Ferrell, 114 N. Car. 301, 19 S. E. 240; Allen v. Woonsocket Co., 11 R. I. 288; McBrayer v. Mills, 62 S. Car. 36, 39 S. E. 788; Mills v. Carrier, 30 S. Car. 617, 9 S. E. 350, 741; Betjemann v. Betjemann (1895), 2 Ch. 474, 64 L. J. Ch. 641; Rawlins v. Wickham, 3 DeG. & J. 304, 5 Jur. (N. S.) 278.

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statute begins to run, there is little uniformity in the decisions, some holding that time to be immediately on dissolution;[54] others when the settlement is had and the balance struck;[55] others after a reasonable time for settlement;[56] others at the time of the last item or transaction on account between the partners;[58] others, if the agreement creates a continuing trust, at the time of the

[54] Stovall v. Clay, 108 Ala. 105, 20 So. 387; West v. Russell, 72 Cal. xxii, 74 Cal. 544, 16 Pac. 392; Richardson v. Gregory, 126 Ill. 166, 18 N. E. 777 (affg. 27 Ill. App. 621); Blake v. Sweeting, 121 Ill. 67, 12 N. E. 67; King v. Wartelle, 14 La. Ann. 740; Currier v. Studley, 159 Mass. 17, 33 N. E. 709; Hutchinson v. Sperry, 158 App. Div. 704, 143 N. Y. S. 876 (revg. judgment 79 Misc. 523, 140 N. Y. S. 220); Gray v. Green, 125 N. Y. 203, 26 N. E. 253 (revg. 41 Hun 524, 6 N. Y. S. 451); Murray v. Coster, 20 Johns. (N. Y.) 576, 11 Am. Dec. 333; Weisman v. Smith, 59 N. Car. 124; Gray v. Kerr, 46 Ohio St. 652, 23 N. E. 136; Jones v. Jones, 10 Ohio Cir. Dec. 71, 18 Ohio Cir. Ct. 260; Borland's Appeal (Pa.), 83 Atl. 110; Guldin v. Lorah, 141 Pa. St. 109, 21 Atl. 504 (affg. 8 Pa. Co. Ct. 503); McKelvy's Appeal, 72 Pa. St. 409; Allen v. Woonsocket Co., 11 R. I. 288; Morris v. Nunn, 79 Tex. 125, 15 S. W. 220.

[55] Thomas v. Hurst, 73 Fed. 372; Prentice v. Elliott, 72 Ga. 154; Hammond v. Hammond, 20 Ga. 556; Weber v. Zacharias, 105 Ill. App. 640; Benoist v. Markey, 25 La. Ann. 59; Bauduc v. Laurent, 2 La. 449; Matthews v. Adams, 84 Md. 143, 35 Atl. 60, 33 Atl. 645; Tutt v. Cloney, 62 Mo. 116; Coudrey v. Gilliam, 60 Mo. 86; Bender v. Markle, 37 Mo. App. 234; Atwater v. Fowler, 1 Edw. Ch. (N. Y.) 417; Rencher v. Anderson, 95 N. Car. 208; McDonald v. Holmes, 22 Ore. 212, 29 Pac. 735; Miller v. Harris, 9 Baxt. (Tenn.) 101; Jordan v. Miller, 75 Va. 442; Foster v. Rison, 17 Grat. (Va.) 321 (applying Code c. 149, § 5); Marsteller v. Weaver, 1 Grat. (Va.) 391; Smith v. Zumbro, 41 W. Va. 623, 24 S. E. 653; Boggs v. Johnson, 26 W. Va. 821; Sandy v. Randall, 20 W. Va. 244.

[56] Prentice v. Elliott, 72 Ga. 154; Gilmore v. Ham, 142 N. Y. 1, 36 N. E. 826, 40 Am. St. 554 (affg. 65 Hun 623, 20 N. Y. S. 203, 48 N. Y. St. 21).

[58] Gayle v. Pennington, 185 Ala. 53, 64 So. 572; Dugger v. Tutwiler, 129 Ala. 258, 30 So. 91; Haynes v. Short, 88 Ala. 562, 7 So. 157; Wells v. Brown, 83 Ala. 161, 3 So. 439; Brewer v. Browne, 68 Ala. 210. See Causler v. Wharton, 62 Ala. 358; Cannon v. Copeland, 43 Ala. 201; Bradford v. Spyker, 32 Ala. 134; White v. Conway, 66 Cal. 383, 5 Pac. 672; Taylor v. Morrison, 7 Dana (Ky.) 241; McClung v. Capehart, 24 Minn. 17; Dye v. Bowling, 82 Mo. App. 587; Todd v. Rafferty, 30 N. J. Eq. 254 [affirmed in 34 N. J. Eq. 552]; Stout v. Seabrook, 30 N. J. Eq. 187 (affd. 32 N. J. Eq. 826); Green v. Ames, 14 N. Y. 225; Roberts v. Nunn (Tex. Civ. App.), 169 S. W. 1086; Bluntzer v. Hirsch, 32 Tex. Civ. App. 585, 75 S. W. 326.

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repudiation of the trust, or of demand,[59] while others make the time dependent on the circumstances of each particular case.[60] If the suit is based on fraud, the statute begins to run when the fraud was discovered, or should have been discovered in the exercise of ordinary diligence.[61] Even where the statute does not apply to the cause, the courts have many times held a demand for accounting barred by laches,[62] as where brought five,[63] ten,[64] twenty,[65] twenty-five,[66] or thirty-one years after dissolution or settlement,[67] even where the statute of limitations had not barred the action,[68] and especially have denied a right to interest because of laches.[69] Where the business had been the buying and selling of real estate and no lands had been purchased for twenty years and all had been sold eleven years before the bill was brought, and no excuse for delay appeared, accounting was de-

[59] Riddle v. Whitehill, 135 U. S. 621, 34 L. ed. 283, 10 Sup. Ct. 924; Causler v. Wharton, 62 Ala. 358; Roach v. Caraffa, 85 Cal. 436, 25 Pac. 22; King v. Hamilton, 16 Ill. 190; Coudrey v. Gilliam, 60 Mo. 86; Faison v. Stewart, 112 N. Car. 332, 17 S. E. 157; McNair v. Ragland, 7 N. Car. 139; Boyd v. Munro, 32 S. Car. 249, 10 S. E. 963; Carroll v. Evans, 27 Tex. 262.

[60] Massey v. Tingle, 29 Mo. 437; Gray v. Green, 142 N. Y. 316, 37 N. E. 124, 40 Am. St. 596 (affg. 66 Hun 469, 21 N. Y. S. 533); Mellish v. McMahon, 64 Hun 638, 19 N. Y. S. 455, 46 N. Y. St. 859; Roberts v. Nunn (Tex. Civ. App.), 169 S. W. 1086.

[61] McCartney v. Boyd (Wis.), 152 N. W. 820; Betjemann v. Betjemann (1895), 2 Ch. 474.

[62] Gayle v. Pennington, 185 Ala. 53, 64 So. 572; Luke v. Rhodes (Ark.), 176 S. W. 111; Glock v. Weikel, 149 Ky. 170, 147 S. W. 897; Lawrence v. Rokes, 61 Maine 38; Stout v. Seabrook, 30 N. J. Eq. 187 (affd. 32 N. J. Eq. 826); Hutchinson v. Sperry, 158 App. Div. 704, 143 N. Y. S. 876; Keller v. Swartz, 137 Pa. St. 65, 20 Atl. 627; Andriessen's Appeal, 123 Pa. St. 303, 16 Atl. 840; Iredell's Appeal, 13 Atl. 752, 10 Pa. Cas. 127, 10 Sad. 127; Wagner v. Sanders, 62 S. Car. 73, 39 S. E. 950; Toothe v. Kittredge, 24 Can. Sup. Ct. 287.

[63] Luke v. Rhodes (Ark.), 176 S. W. 111.

[64] Van Vleet v. Sledge, 45 Fed. 743.

[65] Philippi v. Philippi, 61 Ala. 41; Harris v. Hillegrass, 66 Cal. 79, 4 Pac. 987; Ray v. Bogart, 2 Johns. Cas. (N. Y.) 432.

[66] Bell v. Hudson, 73 Cal. 285, 14 Pac. 791, 2 Am. St. 791.

[67] Robertson v. Burrell, 110 Cal. 568, 42 Pac. 1086.

[68] Hutchinson v. Sperry, 158 App. Div. 704, 143 N. Y. S. 876.

[69] O'Lone v. O'Lone, 2 Grant Ch. (U. C.) 125; Rowe v. Cotton, 17 U. C. Q. B. 533.

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nied.[70] The condition of partnership affairs during its continuance has a bearing on the question of laches, in suing for an account after its termination.[71] Merely allowing one partner to run the business and remaining in a distant state is not such laches as to bar accounting.[72] Circumstances may sometimes justify delay.[73]

§ 719. **Parties.**—It is often stated that all partners are necessary parties to an action for dissolution and accounting[74]

[70] Gayle v. Pennington, 185 Ala. 53, 64 So. 572.

[71] Luke v. Rhodes (Ark.), 176 S. W. 111.

[72] Hutchinson v. Sperry, 79 Misc. 523, 140 N. Y. S. 220.

[73] Consaul v. Cummings, 222 U. S. 262; Clay v. Freeman, 118 U. S. 97, 30 L. ed. 104, 6 Sup. Ct. 964; McGuire v. Ramsey, 9 Ark. 518; Harris v. Hillegass, 54 Cal. 463; Ex parte Harlow, 3 App. D. C. 203; Baker v. Cummings, 4 App. D. C. 230; Petty v. Haas, 122 Iowa 257, 98 N. W. 104; Lawrence v. Rokes, 61 Maine 38; Wiley v. Wiley, 115 Md. 646, 81 Atl. 180, Ann. Cas. 1913 A, 919n; Glenn v. Hebb, 12 Gill & J. (Md.) 271; Dye v. Bowling, 82 Mo. App. 587; McPherson v. Swift, 22 S. Dak. 165, 116 N. W. 76, 133 Am. St. 907; McCartney v. Boyd (Wis.), 152 N. W. 820.

[74] Fourth Nat. Bank v. New Orleans &c. R. Co., 11 Wall. (U. S.) 624, 20 L. ed. 82; Vose v. Philbrook, 3 Story (U. S.) 335, Fed. Cas. No. 17010; Parsons v. Howard, 2 Woods (U. S.) 1, Fed. Cas. No. 10777; Gray v. Larrimore, 2 Abb. 542, 4 Sawy. (U. S.) 638, Fed. Cas. No. 5721; Forcheimer v. Foster (Ala.), 68 So. 879; Webb v. Butler (Ala.), 68 So. 369; Cuyamaca Granite Co. v. Pacific Paving Co., 95 Cal. 252, 30 Pac. 525; Wright v. Ward, 65 Cal. 525, 4 Pac. 534; Settembre v. Putnam, 30 Cal. 490; Lynch v. Foley, 32 Colo. 110, 76 Pac. 370; Elliott v. Deason, 64 Ga. 63; Wells v. Strange, 5 Ga. 22; Gerard v. Bates, 124 Ill. 150, 16 N. E. 258, 7 Am. St. 350; Thickson v. Barry, 138 Ill. App. 100; Francis v. Lavine, 21 La. Ann. 265; Lincoln v. Ball, 6 La. 685; Dufau v. Massicot, 6 Mart. (La.) (N. S.) 182; Yergler v. Kaufmann (Ill. App.), 176 Ill. App. 563; Beal v. Bass, 86 Maine 325, 29 Atl. 1088; Fuller v. Benjamin, 23 Maine 255; McKaig v. Hebb, 42 Md. 227; Bartlett v. Parks, 1 Cush. (Mass.) 82; Wilcox v. Comstock, 37 Minn. 65, 33 N. W. 42; De Manderfield v. Field, 7 N. Mex. 17, 32 Pac. 146; Stokes v. Stokes, 128 N. Y. 615, 28 N. E. 253 (affg. 59 Hun 431, 13 N. Y. S. 407, 36 N. Y. St. 620); Arnold v. Arnold, 90 N. Y. 580; Kirkwood v. Smith, 47 Misc. 301, 95 N. Y. S. 926; Heck v. Collins, 231 Pa. 357, 80 Atl. 535; Boyd v. Boyd, 34 Tex. Civ. App. 57, 78 S. W. 39; Stimson v. Lewis, 36 Vt. 91; Waggoner v. Gray, 2 Hen. & Mun. (Va.) 603; Bainbridge v. Burton, 2 Beav. 539, 17 Eng. Ch. 539; Hills v. Nash, 10 Jur. 148, 15 L. J. Ch. 107; Sibley v. Minton, 27 L. J. Ch. 53, 5 Wkly. Rep. 675; Ireton v. Lewes, Rep. t. Finch 96, 23 Eng. Reprint 52.

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and it is certain that all partners in the jurisdiction of the court must be joined.[75] A merchants' association which conditionally agreed to give a partnership land on which to build a factory is not a necessary party.[76] If none of the partners are dead, and all are residents, they are the only necessary or proper parties to an action for dissolution and settlement.[77] Generally, the assignee or transferee of a partner's interest is a necessary party.[78] So are the personal representatives of a deceased partner,[79] unless they refuse to bring the suit or would be injured

[75] Wright v. Ward, 65 Cal. 525, 4 Pac. 534; Towle v. Pierce, 12 Metc. (Mass.) 329, 46 Am. Dec. 679; Beck v. Thompson, 22 Nev. 109, 36 Pac. 562; Duxbury v. Isherwood, 10 L. T. Rep. (N. S.) 712.

[76] Yergler v. Kaufmann, 176 Ill. App. 563.

[77] Howell v. Harvey, 5 Ark. 270, 39 Am. Dec. 376; Isaacs v. Jones, 121 Cal. 257, 53 Pac. 793, 1101; Harper v. Anderson, 104 Cal. xvii, 37 Pac. 926; Townsend v. Anger, 3 Conn. 354; Warren v. Warren, 56 Maine 360; White v. White, 4 Md. Ch. 418; Sanger v. French, 157 N. Y. 213, 51 N. E. 979 (revg. 91 Hun 599, 36 N. Y. S. 653, 71 N. Y. St. 603); Parker v. Broadbent, 134 Pa. St. 322, 19 Atl. 631; Luzier v. Naylor Line &c. Co., 8 Pa. Dist. 632; In re Flavell, 25 Ch. D. 89, 53 L. J. Ch. 185; Ehrmann v. Ehrmann, 72 L. T. Rep. (N. S) 17; Williams v. Poole, 28 L. T. Rep. (N. S.) 292.

[78] Hoxie v. Carr, 1 Sumn. (U. S.) 173, Fed. Cas. No. 6802; Fountaine v. Urquhart, 33 Ga. Supp. 184; Gerard v. Bates, 124 Ill. 150, 16 N. E. 258, 7 Am. St. 350; Rosenstiel v. Gray, 112 Ill. 282; Fuller v. Benjamin, 23 Maine 255; White v. White, 4 Md. Ch. 418; Glynn v. Phetteplace, 26 Mich. 383; DeManderfield v. Field, 7 N. Mex. 17, 32 Pac. 146; Stokes v. Stokes, 59 Hun (N. Y.) 431, 13 N. Y. S. 407, 36 N. Y. St. 620 (affd. 128 N. Y. 615, 28 N. E. 253); Dayton v. Wilkes, 5 Bosw. (N. Y.) 655; Johnson v. Snyder, 7 How. Pr. (N. Y.) 395; Pitt v. Moore, 99 N. Car. 85, 5 S. E. 389, 6 Am. St. 489; Waugh v. Mitchell, 21 N. Car. 510; Wagner v. Sanders, 49 S. Car. 192, 27 S. E. 68. See also Bartlett v. Parks, 1 Cush. (Mass.) 82. Compare Pearce v. Sutherland, 164 Fed. 609, 90 C. C. A. 519.

[79] Moore v. Huntington, 17 Wall. (U. S.) 417, 21 L. ed. 642; Bartle v. Nutt, 4 Pet. (U. S.) 184, 7 L. ed. 825 (affg. 3 Cranch C. C. 283, Fed. Cas. No. 1072); Brew v. Cochran, 141 Fed. 459; Burchard v. Boyce, 21 Ga. 6; Walmsley v. Mendelsohn, 31 La. Ann. 152; Carpenter v. St. Clair Cir. Judge, 122 Mich. 323, 81 N. W. 95; Jenness v. Smith, 58 Mich. 280, 25 N. W. 191; Harrison v. Righter, 11 N. J. Eq. 389; Secor v. Tradesmen's Nat. Bank, 92 App. Div. 294, 87 N. Y. S. 181; Simpson v. Simpson, 44 App. Div. 492, 60 N. Y. S. 879; Krumbeck v. Clancy, 41 App. Div. 397, 58 N. Y. S. 727; Coster v. Clarke, 3 Edw. Ch. (N. Y.) 428; DeHavens Appeal, 44 Leg. Int. (Pa.) 38; Pettit v. Baird, 30 Leg. Int. (Pa.) 208; Blakely v. Smock, 96 Wis. 611, 71 N. W. 1052; Simpson v. Chapman,

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by being made parties.[80] But an administrator in another state is not a necessary party.[80a] Where a partner broke off relations of partnership before his death, the other partner should sue for an accounting as an individual partner, not as surviving partner in behalf of the firm.[81] Heirs of a deceased partner may be made parties defendant, where their interests will be affected,[82] but can not bring an action for an accounting, since this should be done by the surviving partner,[83] or personal representative of the deceased partner.[84] A retired partner who has been forced to pay debts which the firm agreed to assume may intervene.[85] Creditors are generally held not to be necessary or proper parties to a suit between partners for an accounting,[86] but are sometimes permitted by the court to appear for the establishment of their rights.[87] Where it is essential in the ac-

4 DeG., M. & G. 154; Clegg v. Fishwick, 1 Hall & T. 390; Cox v. Stephens, 9 Jur. (N. S.) 1144; Scholefield v. Heafield, 5 L. J. Ch. 218. But not in a suit for accounting by one partner, where the firm is solvent. Parry v. Parry, 155 N. Y. S. 1072.

[80] Mertens v. Mertens, 87 App. Div. 295, 84 N. Y. S. 352; Blake v. Barnes, 63 Hun 633, 18 N. Y. S. 471, 28 Abb. N. Cas. 401, 45 N. Y. St. 130; Pointon v. Pointon, L. R. 12 Eq. 547, 40 L. J. Ch. 609, 25 L. T. Rep. (N. S.) 294.

[80a] Manship v. Newton, 94 S. Car. 260, 77 S. E. 941.

[81] Gleeson v. Costello (Ariz.), 138 Pac. 544.

[82] Cannon v. Copeland, 43 Ala. 201; McGuire v. Ramsey, 9 Ark. 518; Frederick v. Cooper, 3 Iowa 171; Hackett v. Bank &c. Co., 155 Ky. 392, 159 S. W. 952; Savage v. Williams, 15 La. Ann. 250, 253; Dilworth v. Mayfield, 36 Miss. 40; Haas v. Craighead, 19 Hun (N. Y.) 396.

[83] Van Aken v. Clark, 82 Iowa 256, 48 N. W. 73.

[84] Mason v. Mason, 76 Vt. 287, 56 Atl. 1011; Robinson v. Swift, 3 Vt. 377.

[85] Sheppard v. Bridges, 137 Ga. 615, 74 S. E. 245.

[86] Duden v. Maloy, 37 Fed. 98; Hoxie v. Carr, 1 Sumn. (U. S.) 173, Fed. Cas. No. 6802; New Orleans v. Gauthreaux, 32 La. Ann. 1126; Gridley v. Conner, 2 La. Ann. 87; Davis v. Grove, 2 Rob. (N. Y.) 134, 27 How. Pr. 70; Freeman v. Miller, 157 App. Div. 715, 142 N. Y. S. 797; Escott v. Gray, 47 L. J. C. P. 606, 39 L. T. Rep. (N. S.) 121.

[87] Grossini v. Perazzo, 66 Cal. 545, 6 Pac. 450; White v. White, 169 Mass. 52, 47 N. E. 499; Washburn v. Goodman, 17 Pick. (Mass.) 519; Bell v. Miller, 11 Ohio Dec. (Reprint) 163, 25 Cinc. L. Bul. 126; Updike v. Doyle, 7 R. I. 446; Holder v. Shelby (Tex.), 118 S. W. 590; Jacobson v. Landolt, 73 Wis. 142, 40 N. W. 636, 9 Am. St. 767; Newton v. Doran, 3 Grant. Ch. (U. C.) 353.

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counting to impeach a transfer made by one partner of firm property as fraudulent, or where one partner has formed a scheme or conspiracy inimical to the partnership with a third person, such fraudulent grantee or confederate may be made a party.[89]

§ 720. **Injunction.**—An injunction will not be granted upon the dissolution of a partnership, unless necessary to the protection of the rights of the parties to the suit.[90] It may be granted to restrain an insolvent partner from misapplying property of the firm;[91] from excluding a partner from his right to participate in winding up partnership affairs;[92] from creating

[89] Doudell v. Shoo, 20 Cal. App. 424, 129 Pac. 478; Lovejoy v. Bailey, 214 Mass. 134, 101 N. E. 63; Palmer v. Tyler, 15 Minn. 106; Anable v. Min. Co., 144 Mo. App. 303, 128 S. W. 1012; Penniman v. Jones, 58 N. H. 447; Schlicher v. Vogel, 61 N. J. Eq. 158, 47 Atl. 448 (affd. 65 N. J. Eq. 404, 54 Atl. 1125), 59 N. J. Eq. 351, 46 Atl. 726; Jennings v. Whittemore, 2 Thomps. & C. (N. Y.) 377 (affd. 58 N. Y. 675); Webb v. Helion, 26 N. Y. Super. Ct. 625; Wade v. Rusher, 4 Bosw. (N. Y.) 537; Capecci v. Alladio, 8 Wash. 637, 36 Pac. 692.

[90] Goldman v. Circuit Judge, 155 Mich. 47, 118 N. W. 600; Moies v. O'Neill, 23 N. J. Eq. 207; Van Kuren v. Trenton Locomotive &c. Mfg. Co., 13 N. J. Eq. 302; Petit v. Chevelier, 13 N. J. Eq. 181; Greenwald v. Gotham-Attucks Music Co., 118 App. Div. 29, 103 N. Y. S. 123; Dunham v. Jarvis, 8 Barb. (N. Y.) 88, 2 Edm. Sel. Cas. 145; Walker v. Trott, 4 Edw. (N. Y.) 38; Ellis v. Commander, 1 Strobh. Eq. (S. Car.) 188; Morison v. Moat, 16 Jr. 321, 21 L. J. Ch. 248 (affg. 9 Hare 241, 15 Jur. 787, 20 L. J. Ch. 513, 41 Eng. Ch. 241, 68 Eng. Reprint 492); Littlewood v. Caldwell, 11 Price 97, 25 Rev. Rep. 711; Cofton v. Horner, 5 Price 537; Lawson v. Morgan, 1 Price 303; Webster v. Webster, 3 Swanst. 490, 19 Rev. Rep. 258; Glassington v. Thwaites, 1 L. J. Ch. (O. S.) 113, 1 Sim. & St. 124.

[91] Gaddie v. Mann, 147 Fed. 960 (revd. on other grounds in 158 Fed. 42); Fletcher v. Vandusen, 52 Iowa 448, 3 N. W. 488; Drury v. Roberts, 2 Md. Ch. 157; McCabe v. Sinclair, 66 N. J. Eq. 24, 58 Atl. 412; Large v. Ditmars, 27 N. J. Eq. 283; Randall v. Morrell, 17 N. J. Eq. 343; Davis v. Grove, 2 Rob. (N. Y.) 134, 27 How. Pr. 70; Haggerty v. Granger, 15 How. Pr. (N. Y.) 243; Taylor v. Russell, 119 N. Car. 30, 25 S. E. 710; Francis v. Spittle, 9 L. J. Ch. 230; Lawson v. Morgan, 1 Price 303; Hartz v. Schrader, 8 Ves. Jr. 317, 7 Rev. Rep. 55; Thibodo v. Scobell, 5 Can. L. J. 117; Watt v. Foster, 4 Grant Ch. (U. C.) 543; Wilson v. Richardson, 2 Grant Ch. (U. C.) 448.

[92] Gaddie v. Mann, 147 Fed. 960 (revd. on other grounds in 158 Fed. 42); Webb v. Butler (Ala.), 68 So. 369; Sutro v. Wagner, 23 N. J. Eq.

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new obligations,[93] or from doing other acts which would cause irreparable injury to the partners or to firm property.[94] An injunction and receiver may be granted or where both partners have violated their reciprocal duties in failing to properly account and take exclusive possession of firm assets, though neither is insolvent.[95] Generally injunction will not be granted where a partnership is denied,[96] or where all the equitable grounds of the petition are denied.[97]

§ 721. Appointment of receiver.—Upon suit for a partnership dissolution and accounting, it is usually within the court's power and discretion to appoint a receiver.[98] Courts are hesitant in

388 (affd. 24 N. J. Eq. 589); Wolbert v. Harris, 7 N. J. Eq. 605; McCrackan v. Ware, 3 Sandf. (N. Y.) 688; Ellis v. Commander, 1 Strobh. Eq. (S. Car.) 188; Zimmerman v. Chambers, 79 Wis. 20, 47 N. W. 947; Hall v. Hall, 12 Beav. 414, 50 Eng. Reprint 1119; Greatrex v. Greatrex, 1 DeG. & Sm. 692, 11 Jur. 1052; Blachford v. Hawkins, 1 L. J. Ch. (O. S.) 141.

[93] Joselove v. Bohrman, 119 Ga. 204, 45 S. E. 982; J. v. S. [1894], 3 Ch. 72, 63 L. J. Ch. 615.

[94] Wilkinson v. Tilden, 9 Fed. 683; Wagoner v. Warne (N. J.), 14 Atl. 215 (1888); Coe v. Davidge, 42 Hun 656, 6 N. Y. St. 93; Mitchell v. Stewart, 3 Abb. Pr. (N. S.) (N. Y.) 250; Sloan v. Moore, 37 Pa. St. 217; In re Slobig's Appeal, 2 Sad. (Pa.) 365, 5 Atl. 670; Koehler v. Roshi, 28 Leg. Int. (Pa.) 373; Ballard v. Callison, 4 W. Va. 326; Marshall v. Watson, 25 Beav. 501, 53 Eng. Reprint 728; Anderson v. Wallace, 2 Molloy 540; Elliot v. Brown, 3 Swanst. 489, 36 Eng. Reprint 948.

[95] Pritchett v. Kennedy, 140 Ga. 248, 78 S. E. 902.

[96] McMahon v. O'Donnell, 20 N. J. Eq. 306; Goulding v. Bain, 4 Sandf. (N. Y.) 716; Popper v. Scheider, 7 Abb. Pr. (N. S.) (N. Y.) 56, 38 How. Pr. 34; Baxter v. Buchanan, 3 Brewst. (Pa.) 435.

[97] Gusdorff v. Schlessner, 85 Md. 360, 37 Atl. 170; Quinlivan v. English, 44 Mo. 46; Hollister v. Barkley, 9 N. H. 230; Fielding v. Lucas, 87 N. Y. 197 (affg. 22 Hun 22, 60 How. Pr. 134); Wickes v. Hatch, 103 App. Div. 426, 92 N. Y. S. 1017; Donnelly v. Morris, 59 N. Y. Super. Ct. 557, 13 N. Y. S. 427; White v. Jones, 1 Abb. Pr. (N. S.) 328, 24 N. Y. Super. Ct. 321; Green v. Tuchner, 39 Misc. 154, 79 N. Y. S. 143; Philipp v. Von Raven, 26 Misc. 552, 57 N. Y. S. 701.

[98] Gillett v. Higgins, 142 Ala. 444, 38 So. 664; Silveira v. Reese, 138 Cal. xix, 71 Pac. 515; Robbins v. Reed, 174 Ind. 291, 91 N. E. 921; Meyer v. Meyer, 116 La. 456, 40 So. 794; McNair v. Gourrier, 40 La. Ann. 353, 4 So. 310; Pratt v. McHatton, 11 La. Ann. 260; Gridley v. Conner, 2 La. Ann. 87; Bacon v. Engstrom, 129 Minn. 229, 152 N. W. 264, 537; Norton v. Sperry, 113 Minn. 447, 129 N. W. 843; Walsh v. St. Paul School

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the use of this power, since the partners will be deprived entirely from participation in management of firm affairs,[99] and will rarely appoint a receiver if there has been an agreement of the partners relative to the manner of settlement.[1] If the existence of the partnership is denied, the court must be satisfied of its existence, and that the funds are in danger, before appointing a receiver.[2] If all the partners are living and join in a request

Furniture Co., 60 Minn. 397, 62 N. W. 383; Cox v. Volkert, 86 Mo. 505; Rhodes v. Wilson (N. J. Eq.), 19 Atl. 732; Wilson v. Fitcher, 11 N. J. Eq. 71; Birdsall v. Colie, 10 N. J. Eq. 63; Dunham v. Jarvis, 8 Barb. 88, 2 Edm. Sel. Cas. (N. Y.) 145; Pratt v. Underwood, 4 N. Y. Civ. Proc. 167; Garretson v. Weaver, 3 Edw. (N. Y.) 385; Greenwald v. Gotham-Attucks Music Co., 118 App. Div. 29, 103 N. Y. S. 123; Bimberg v. Wagenhals, 53 Misc. 13, 102 N. Y. S. 925; Sarasohn v. Kamaiky, 110 App. Div. 713, 97 N. Y. S. 529; Nolan v. Nolan, 8 Lack. Leg. N. (Pa.) 291; Spencer v. Emery, 8 Lack. Leg. N. (Pa.) 278; Shulte v. Hoffman, 18 Tex. 678; Rische v. Rische, 46 Tex. Civ. App. 23, 101 S. W. 849; Webb v. Allen, 15 Tex. Civ. App. 605, 40 S. W. 342; Martin v. Wilson, 84 Wash. 625, 147 Pac. 404; Pini v. Roncoroni [1892], 1 Ch. 633, 61 L. J. Ch. 218, 66 L. T. 255, 40 W. R. 297.

[99] Cary Bros. v. Dalhoff Constr. Co., 126 Fed. 584; Devereux v. Fleming, 47 Fed. 177; Bard v. Bingham, 54 Ala. 463; Loomis v. McKenzie, 31 Iowa 425; Goldman v. Manistee Circuit Judge, 155 Mich. 47, 118 N. W. 600; Morey v. Grant, 48 Mich. 326, 12 N. W. 202; Albrecht v. Diamon, 125 Minn. 283, 146 N. W. 1101; Nathan v. Bacon (N. J.), 72 Atl. 359; Hard v. Klaus, 9 N. J. L. 370; Moies v. O'Neill, 23 N. J. Eq. 207; Cox v. Peters, 13 N. J. Eq. 39; Birdsall v. Colie, 10 N. J. Eq. 63; Cohn v. Wahn, 117 N. Y. S. 633; Buchanan v. Comstock, 57 Barb. (N. Y.) 568; Webb v. Allen, 15 Tex. Civ. App. 605, 40 S. W. 342; Smith v. Brown, 50 Wash. 240, 96 Pac. 684; Wales v. Dennis, 9 Wash. 308, 37 Pac. 450; Oliver v. Hamilton, 2 Anstr. 453, 3 Rev. Rep. 611; Baxter v. West, 28 L. J. Ch. 169; Waters v. Taylor, 2 Ves. & B. 299, 15 Ves. 10, 13 R. R. 91; Carlen v. Drury, 1 Ves. & B. 154, 12 R. R. 203; Burden v. Howard, 2 N. Brunsw. Eq. 461.

[1] Fullenwider v. Bank, 101 Ark. 259, 142 S. W. 149; Bufkin v. Boyce, 104 Ind. 53, 3 N. E. 615; Heflebower v. Buck, 64 Md. 15, 20 Atl. 991; Drury v. Roberts, 2 Md. Ch. 157; Simon v. Schloss, 48 Mich. 233, 12 N. W. 196; Parkhurst v. Muir, 7 N. J. Eq. 307; Hoffman v. Hauptner, 135 App. Div. 148, 119 N. Y. S. 1022; Meyer v. Reimers, 49 App. Div. 638, 63 N. Y. S. 1112 (affg. 30 Misc. 307, 63 N. Y. S. 681); Rice v. Baggot, 54 Hun 637, 7 N. Y. S. 518, 27 N. Y. St. 181, 4 Silv. Sup. 383 (affd. 130 N. Y. 636, 29 N. E. 151); MacDonald v. Trojan Button-Fastener Co., 56 Hun 648, 10 N. Y. S. 91, 31 N. Y. St. 374; Law v. Garrett, 8 Ch. D. 26, 38 L. T. 3, 26 W. R. 426.

[2] Rowland v. Auto Car Co., 133 Fed. 835; Irwin v. Everson, 95 Ala. 64, 10 So. 320; Williamson v. Mon-

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for a receiver, the court will usually appoint one.[3] Receivers have also been appointed because of a serious breach of the agreement as to the disposition of assets on settlement;[4] or disagreements during the time of settlement, concerning management of firm affairs;[5] or misconduct threatening waste of as-

roe, 3 Cal. 383; Leeds v. Townsend, 74 Ill. App. 444; Hobart v. Ballard, 31 Iowa 521; Bacon v. Engstrom, 129 Minn. 229, 152 N. W. 264; Albrecht v. Diamon, 125 Minn. 283, 146 N. W. 1101; Bimberg v. Wagenhals, 53 Misc. 13, 102 N. Y. S. 925; Kirkwood v. Smith, 64 App. Div. 615, 72 N. Y. S. 291; Day v. Dow, 46 App. Div. 148, 61 N. Y. S. 793; McCarty v. Stanwix, 16 Misc. 132, 38 N. Y. S. 820; Goulding v. Bain, 4 Sandf. (N. Y.) 716; Moyn v. Rose, 245 Pa. 601, 92 Atl. 39; Baxter v. Buchanan, 3 Brewst. (Pa.) 435; McGlensey v. Cox, 1 Phila. (Pa.) 387; Smith v. Brown, 50 Wash. 240, 96 Pac. 684; Ballard v. Callison, 4 W. Va. 326; Wood v. Wood, 50 W. Va. 570, 40 S. E. 416; Rische v. Rische, 46 Tex. Civ. App. 23, 101 S. W. 849; Goulding v. Bain, 4 Sandf. (N. Y.) 716. Compare Hackett v. Multnomah R. Co., 12 Ore. 124, 53 Am. Rep. 327.

[3] Saylor v. Mockbie, 9 Iowa 209; Fitzner v. Noullet, 114 La. 167, 38 So. 94; Newman v. Schminke, 50 La. Ann. 516, 23 So. 714; Todd v. Rich, 2 Tenn. Ch. 107; Southwell v. Church, 51 Tex Civ. App. 547, 111 S. W. 969; Taylor v. Neute, 39 Ch. D. 538, 57 L. J. Ch. 1044, 60 L. T. 179, 37 W. R. 190; Mitchell v. Lister, 21 Ont. 22.

[4] Einstein v. Schnebly, 89 Fed. 540; Whitley v. Bradley, 13 Cal. App. 720, 110 Pac. 596; West v. Chasten, 12 Fla. 315; Haight v. Burr, 19 Md. 130; Sutro v. Wagner, 23 N. J. Eq. 388 (affd. 24 N. J. Eq. 589); Wolbert v. Harris, 7 N. J. Eq. 605; Heathcot v. Ravenscroft, 6 N. J. Eq. 113; Sloan v. Moore, 37 Pa. St. 217; Gowan v. Jeffries, 2 Ashm. (Pa.) 296; Redding v. Anderson, 37 Wash. 209, 79 Pac. 628; Hale v. Hale, 4 Beav. 369; Lawson v. Morgan, 1 Price 303; Harding v. Glover, 18 Ves. 281; Blakeney v. Dufaur, 15 Beav. 40, 51 Eng. Reprint 451; Steele v. Grossmith, 19 Grant Ch. (U. C.) 141; Doupe v. Stewart, 13 Grant Ch. (U. C.) 637; Prentiss v. Brennan, 1 Grant Ch. (U. C.) 371.

[5] Gillett v. Higgins, 142 Ala. 444, 38 So. 664; Allen v. Hawley, 6 Fla. 142, 63 Am. Dec. 198; Bennett v. Smith, 108 Ga. 466, 34 S. E. 156; Taylor v. Bliley, 86 Ga. 154, 12 S. E. 210; Dunn v. McNaught, 38 Ga. 179; Pressley v. Lamb, 105 Ind. 171, 4 N. E. 682; Wehmeier v. Banking Co., 49 Ind. App. 454, 97 N. E. 558; Taylor v. Welles, 113 Iowa 326, 85 N. W. 30; Anderson v. Powell, 44 Iowa 20; Story v. Moon, 3 Dana (Ky.) 331; Whitman v. Robinson, 21 Md. 30; Speights v. Peters, 9 Gill (Md.) 472; Walker v. House, 4 Md. Ch. 89; Kirby v. Ingersoll, 1 Dougl. (Mich.) 477; Martin v. Hurley, 84 Mo. App. 670; Veith v. Ress, 60 Nebr. 52, 82 N. W. 116; Birdsall v. Colie, 10 N. J. Eq. 63; McElvey v. Lewis, 76 N. Y. 373; Wilcox v. Pratt, 52 Hun 340, 5 N. Y. S. 361 (affd. 125 N. Y. 688, 25 N. E. 1091); Witherbee v. Witherbee, 17 App. Div. 181, 45 N. Y. S. 297; Brush v. Jay, 50 Hun 446, 3 N. Y. S. 332, 21 N. Y. St.

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sets.[6] Thus, a petition for the appointment of a receiver for a firm, which avers that the parties are partners, that defendant refuses

312 (revd. 113 N. Y. 482, 21 N. E. 184); Richards v. Baurman, 65 N. Car. 162; Fleming v. Carson, 37 Ore. 252, 62 Pac. 374; Fox v. Curtis, 176 Pa. St. 52, 34 Atl. 952; Sloan v. Moore, 37 Pa. St. 217; Watson v. McKinnon, 73 Tex. 210, 11 S. W. 197; Southwell v. Church, 51 Tex. Civ. App. 547, 111 S. W. 792; Rische v. Rische, 46 Tex. Civ. App. 23, 101 S. W. 849; Jordan v. Miller, 75 Va. 442; Martin v. Wilson, 84 Wash. 625, 147 Pac. 404; Whipple v. Lee, 46 Wash. 266, 89 Pac. 712; McMahon v. McClernan, 10 W. Va. 419; Schmidt v. Mertes, 145 Wis. 468, 130 N. W. 474; Jefferys v. Smith, 1 Jac. & W. 298, 21 R. R. 175; Katsch v. Schenck, 13 Jur. 668, 18 L. J. Ch. 386; Smith v. Jeyes, 4 Beav. 503, 49 Eng. Reprint 433; Davis v. Amer, 3 Drew 64, 61 Eng. Reprint 826; Wilson v. Greenwood, 1 Swanst. 471, 1 Wils. Ch. 223, 18 R. R. 118, 36 Eng. Reprint 469; McLaren v. Whiting, 16 Ont. Pr. 552.

[6] Gaddie v. Mann, 147 Fed. 960 (revd. on other grounds 158 Fed. 42); Watson v. Bettman, 88 Fed. 825; Brooke v. Tucker (Ala.), 43 So. 141; Fischer v. Superior Ct. of Tuolumne County, 98 Cal. 67, 32 Pac. 875; Joselove v. Bohrman, 119 Ga. 204, 45 S. E. 982; Fink v. Montgomery, 162 Ind. 424, 68 N. E. 1010; Barnes v. Jones, 91 Ind. 161; Katz v. Brewington, 71 Md. 79, 20 Atl. 139; Shannon v. Wright, 60 Md. 520; Speights v. Peters, 9 Gill (Md.) 472; Drury v. Roberts, 2 Md. Ch. 157; Williamson v. Wilson, 1 Bland (Md.) 418; Reid v. Freed, 100 Miss. 48, 56 So. 278; Maynard v. Railey, 2 Nev. 313; Coddington v. Tappan, 26 N. J. Eq. 141; Randall v. Morrell, 17 N. J. Eq. 343; Geortner v. Canajoharie, 2 Barb. (N. Y.) 625; Haggerty v. Granger, 15 How. (N. Y.) Pr. 243; Phillips v. Trezevant, 67 N. Car. 370; Jones v. Weir, 217 Pa. 321, 66 Atl. 550. See also Warren v. Stagner, 7 Wkly. Notes Cas. (Pa.) 127; Dolphin v. Steell, 2 Lack. Leg. N. (Pa.) 111; Gowan v. Jeffries, 2 Ashm. (Pa.) 296; Whilden v. Chapman, 80 S. Car. 84, 61 S. E. 261; Rische v. Rische, 46 Tex. Civ. App. 23, 101 S. W. 849; Cole v. Price, 22 Wash. 18, 60 Pac. 153; Wilson v. Lumber Co., 74 W. Va. 65, 81 S. E. 568; Ballard v. Callison, 4 W. Va. 326; Smith v. Jeyes, 4 Beav. 503, 49 Eng. Reprint 433; Butchart v. Dresser, 4 DeG., M. & G. 542, 10 Hare 453; Freeland v. Stansfield, 2 Eq. Rep. 1181, 1 Jur. (N. S.) 8, 2 W. R. 575, 2 Sm. & G. 479, 23 L. J. Ch. 923; Cane v. Macdonald, 9 Brit. Col. 297; Prentiss v. Brennan, 2 Grant Ch. (U. C.) 322. Thus where two partners, who owned timber land and a sawmill, formed a partnership with a third party, who had no capital, but was to operate the mill, share in the net profits and account with the owners, and the third partner purchased timber without the consent of the others, operated a store without their consent and at a loss, caused the expenses to be largely in excess of the gross income from the mill, improperly used money furnished by his partners, failed to produce proper accounts or pay rolls as a basis for a settlement with the employés, and refused to deliver up the possession of

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to contribute his part of the capital, that plaintiff has contributed more than his share of the expenses, that defendant refuses to account to him for any part thereof, or to co-operate in the prosecution of the business, that no division of the assets or goodwill can be mutually agreed on, and that the only equitable way of making a division is by a sale of the property, and which asks for a dissolution and an accounting, states a good cause of action for a dissolution and an accounting, and justifies the appointment of a receiver.[7] A receiver has been appointed on the ground of a partner's insanity;[8] and for a law partnership where there was lack of harmony between the partners and one was excluded from the business.[9] Very strong and clear proof of mismanagement or unfair conduct, or of individual insolvency, must be shown before a court will appoint a receiver to take charge of the affairs of a firm which are being settled by a surviving partner,[10] but it may be done under some circumstances, as where the surviving partner sold the entire firm property to a corporation, and refused the deceased partner's wife access to the books.[10a] A receiver may be appointed where both partners are dead.[11] A receiver may be appointed to wind up the affairs and distribute profits, when persons engaged in a manufacturing en-

the mill to his partners, it was held, on a bill for a dissolution of the partnership, that a receiver was necessary to manage the business and settle the rights of the parties. Reid v. Freed, 100 Miss. 48, 56 So. 278.

[7] Smith v. Lamon (Tex. Civ. App.), 143 S. W. 304.

[8] Reynolds v. Austin, 4 Del. Ch. 24.

[9] Martin v. Wilson, 84 Wash. 625, 147 Pac. 404.

[10] Painter v. Painter (Cal.), 36 Pac. 865; Helme v. Littlejohn, 12 La. Ann. 298; Comstock v. McDonald, 113 Mich. 626, 71 N. W. 1087; Miller v. Miller, 80 N. J. Eq. 47, 82 Atl. 513; Booth v. Smith, 79 Hun 384, 29 N. Y. S. 790, 61 N. Y. St. 496; Dawson v. Parsons, 21 N. Y. S. 212 (affg. 20 N. Y. S. 65); Brown v. Finch, 63 Hun 235, 17 N. Y. S. 805, 28 Abb. N. Cas. 36; People's Nat. Bank v. Hodgin, 129 N. Car. 247, 39 S. E. 959; Holden v. McMakin, 1 Pars. Eq. Cas. (Pa.) 270; Jennings v. Chandler, 10 Wis. 21; Madgwick v. Wimble, 6 Beav. 495, 7 Jur. 661, 14 L. J. Ch. 387; Fraser v. Kershaw, 2 Jur. (N. S.) 880, 2 Kay & J. 496, 25 L. J. Ch. 445, 4 W. R. 431; Young v. Buckett, 51 L. J. Ch. 504, 46 L. T. 266, 30 W. R. 511; Bilton v. Blakely, 6 Grant Ch. (U. C.) 575.

[10a] Miller v. Miller, 80 N. J. Eq. 47, 82 Atl. 513.

[11] Philips v. Atkinson, 2 Bro. C. C. 272.

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terprise, who became partners through an invalid corporate organization, ceased business.[12] It is only in rare cases that creditors of a firm can obtain the appointment of a receiver, though they have been permitted to do so in some instances where it is necessary to preserve the property.[13]

§ 722. **Powers and duties of receiver.**—Immediately upon appointment of a receiver, the entire assets of the partnership come into the custody of the court, and a partner or creditor who interferes with the assets without permission, is guilty of a contempt.[14] The appointment of a receiver does not affect the rights of creditors in the property taken.[15] The receiver of

[12] Smith v. Schoodoc Pond Packing Co., 109 Maine 555, 84 Atl. 268.

[13] Oliver v. Victor, 74 Ga. 543; Staar v. Moy Tong Koon, 145 Ill. App. 341; Choppin v. Wilson, 27 La. Ann. 444; Lawrence Lumber Co. v. Lyon, 93 Miss. 859, 47 So. 849; Greenwood v. Brodhead, 8 Barb. (N. Y.) 593; Henry v. Henry, 10 Paige (N. Y.) 314; Stone Co. v. McLamb, 153 N. Car. 378, 69 S. E. 281; Bell v. Miller, 11 Ohio Dec. (Reprint) 163, 25 Cin. Wkly. L. Bul. 126.

[14] Patterson v. Patterson, 182 Fed. 952; Adams v. Woods, 9 Cal. 24; Naglee v. Minturn, 8 Cal. 540; Adams v. Woods, 8 Cal. 152, 68 Am. Dec. 313; Adams v. Hackett, 7 Cal. 187; Jackson v. Lahee, 114 Ill. 287, 2 N. E. 172; Wallace v. Milligan, 110 Ind. 498, 11 N. E. 599; Andrew's Succession, 16 La. Ann. 197; Veith v. Ress, 60 Nebr. 52, 82 N. W. 116; Ross v. Titsworth, 37 N. J. Eq. 333; Gross v. Gross, 128 App. Div. 429, 112 N. Y. S. 790; Holmes v. McDowell, 76 N. Y. 596 (affg. 15 Hun 585); Clapp v. Clapp, 10 N. Y. St. 733; Barry v. Kennedy, 11 Abb. Pr. (N. S.) (N. Y.) 421; Waring v. Robinson, 1 Hoff. Ch. (N. Y.) 524; Merrick v. Merchants' Nat. Bank, 11 Ohio Sup. Ct. Com. Pl. Dec. 293; Foster v. Field, 13 Okla. 230, 74 Pac. 190; In re Hamilton, 26 Ore. 579, 38 Pac. 1088; Cole v. Price, 22 Wash. 18, 60 Pac. 153; Defries v. Creed, 11 Jur. (N. S.) 360, 6 New Rep. 17, 12 L. T. 262, 13 W. R. 632; Chater v. Maclean, 3 Eq. Rep. 375, 1 Jur. (N. S.) 175, 3 W. R. 261; Brand v. Sandground, 85 L. T. Rep. (N. S.) 517; Dacie v. John, McClell. 206, 13 Price 446, 28 Rev. Rep. 706; O'Brien v. Christie, 30 Nova Scotia 145; Prentiss v. Brennan, 1 Grant Ch. (U. C.) 484; Helmore v. Smith, 35 Ch. D. 449, 56 L. J. Ch. 145, 56 L. T. 72, 35 W. R. 157; Lane v. Sterne, 3 Giffard 629, 9 Jur. (N. S.) 320, 10 W. R. 555.

[15] Stuparick Mfg. Co. v. San Francisco Super. Ct., 123 Cal. 290, 55 Pac. 985; Adams v. Woods, 9 Cal. 24; Norton v. Sperry, 113 Minn. 447, 129 N. W. 843; Bird v. Austin, 40 N. Y. Super. Ct. 109; Van Alstyne v. Cook, 25 N. Y. 489; Higgins v. Bailey, 7 Rob. (N. Y.) 613; McGrath v. Cowen, 57 Ohio St. 385, 49 N. E. 338; Blakeney v. Dufaur, 15 Beav. 40, 51 Eng. Reprint 451.

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the firm has no rights over the individual property of the partners,[16] and takes no better title to any property than that which the partnership had, being affected by all claims and liens and equities which would prevail against the firm.[17] The appointment of a receiver for a solvent partnership on request of the partners, will not prevent their creditors securing judgment liens on firm property.[18] After a receiver has been appointed no partner is entitled to any portion of the money into which firm assets have been converted, until all partnership debts have been paid.[19] The receiver may do everything necessary to wind up the firm business in the ordinary manner, and is not compelled to follow the directions of any of the partners.[20] He is a trustee for all the partners,[21] but has no power to bind them to a new obligation.[22] A receiver may be authorized to carry on the business temporarily, in order to finish firm contracts, or wind it up properly, but can not be authorized to carry on the business permanently.[23] It is held that a receiver for a law partnership is not authorized to attend to the law practice in the courts of the partners.[24] The receiver of a partnership may bring actions to

[16] Adams v. Hannah, 97 Ga. 515, 25 S. E. 330; Wallace v. Milligan, 110 Ind. 498, 11 N. E. 599; Saylor v. Mockbie, 9 Iowa 209.

[17] Security Title Co. v. Schleuder, 190 Ill. 609, 60 N. E. 854; Gillan v. Nussbaum, 95 Ill. App. 277; Rickman v. Rickman, 180 Mich. 224, 146 N. W. 609, Ann. Cas. 1915 C, 1237.

[18] Myers v. Myers, 15 App. Div. 448, 44 N. Y. S. 513; Schloss v. Schloss, 14 App. Div. 333, 43 N. Y. S. 788; Matter of Thompson, 10 App. Div. 40, 41 N. Y. S. 740, 75 N. Y. St. 1133; Bergin v. Deering, 70 Hun 379, 24 N. Y. S. 36, 53 N. Y. St. 893. Compare Longstaff v. Hurd, 66 Conn. 350, 34 Atl. 91.

[19] Bishop v. Pendley, 138 Ga. 738, 76 S. E. 63.

[20] Holloway v. Turner, 61 Md. 217; Dixon v. Dixon [1904], 1 Ch. 161, 73 L. J. Ch. 103; Hills v. Reeves, 31 Wkly. Rep. 209 (affg. 30 Wkly. Rep. 439).

[21] Honore v. Colmesnil, 1 J. J. Marsh. (Ky.) 506.

[22] Lake v. Munford, 4 Sm. & M. (Miss.) 312.

[23] Patterson v. Patterson, 182 Fed. 952; Rochat v. Gee, 137 Cal. 497, 70 Pac. 478; Allen v. Hawley, 6 Fla. 142, 63 Am. Dec. 198; Wolbert v. Harris, 7 N. J. Eq. 605; Jackson v. DeForest, 14 How. Pr. (N. Y.) 81; Marten v. Van Schaick, 4 Paige (N. Y.) 479.

[24] Martin v. Wilson, 84 Wash. 625, 147 Pac. 404.

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collect the debts due the firm, and to protect its rights,[25] and can bring a suit to recover unpaid subscriptions to partnership capital,[26] but has no right to bring an action to set aside transactions of the partners, such as the conveyance of firm property, as in fraud of creditors,[27] and can not be sued without the court's permission.[28] A receiver to hold firm assets and dispose of them, may refuse to sue to set aside a conveyance by a partner until he is given indemnity for costs and expenses, where the cause of action is the firm's sole asset.[29] It has been held that the receiver of a partnership can not be sued for a tort committed by the partnership before his appointment, on the theory that the receiver is answerable only for the consequences of the acts and negligence of his own servants and employés.[30] However, it is also held that such an action will lie for the reason that the claim should not be defeated merely because the property of the wrongdoers is in the hands of a receiver.[31] The receiver is under a duty to account,[32] and to pay over any balance to the partners.[33] The funds earned by a receiver in carrying on the business should be paid into the general fund and applied to capital and profits.[34] The mere bringing of a suit for accounting and dissolution does not dissolve the partnership before decree.[35]

[25] Nealis v. Lissner, 52 Hun 503, 5 N. Y. S. 682, 24 N. Y. St. 196; Fincke v. Fincke, 25 Hun (N. Y.) 616; Barry v. Nelms, 2 Pac. County Ct. 440; Prentiss v. Brennan, 2 Grant Ch. (U. C.) 274. Compare McBride v. Ricketts, 98 Iowa 539, 67 N. W. 410, and May v. Pagett, 2 Pa. Dist. 276.

[26] Torbe v. Strauss, 155 Wis. 518, 144 N. W. 184, 1136.

[27] Walsh v. St. Paul School Furniture Co., 60 Minn. 397, 62 N. W. 383; Berlin Mach. Works v. Security Trust Co., 60 Minn. 161, 61 N. W. 1131; Ferguson v. Bruckman, 23 App. Div. 182, 48 N. Y. S. 887; Weber v. Weber, 90 Wis. 467, 63 N. W. 757.

[28] Robinson v. Hodgkins, 168 Mass. 465, 47 N. E. 195; Blum v. Van Vechten, 92 Wis. 378, 66 N. W. 507.

[29] Flinn v. Hanbury, 157 App. Div. 207, 141 N. Y. S. 844.

[30] Emory v. Faith, 113 Md. 253, 77 Atl. 386, Ann. Cas. 1912 A, 586.

[31] Everett v. Gores, 89 Wis. 421, 62 N. W. 82.

[32] Gridley v. Conner, 2 La. Ann. 87; Clapp v. Clapp, 10 N. Y. St. 733.

[33] Rochat v. Gee, 137 Cal. 497, 70 Pac. 478; Slater v. Slater, 78 App. Div. 449, 80 N. Y. S. 363.

[34] Kennedy v. Hill, 89 S. Car. 462, 71 S. E. 974.

[35] Marye v. Jones, 9 Cal. 335; Naglee v. Minturn, 8 Cal. 540; Bagnetto v. Bagnetto, 51 La. Ann. 1200, 25 So. 987; Ross v. Titsworth, 37 N.

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§ 723. **Procedure at trial.**—The procedure in a suit for a partnership accounting is the ordinary equity procedure.[36] Disputed questions of fact may be tried by a jury under proper instructions from the court,[37] but it is the rule that the court may adopt or reject the findings of the jury as he sees fit.[38] If the fact of partnership is not admitted the court should find it before ordering dissolution, or accounting,[39] but this is unnecessary where the partnership is admitted.[40] Where the bill is for accounting after dissolution, there is a right of course to the order for accounting, if not lost by laches or otherwise.[41] The accounting will often be ordered by an interlocutory decree, or an interlocutory decree of dissolution may be granted.[42] A decree awarding the assets to some of the partners, to whom it was provided in the partnership agreement they should go on dissolution, should not be granted until the firm debts and costs

J. Eq. 333; Brown v. Gray, 17 Pa. Super. Ct. 563.

[36] Southworth v. People, 183 Ill. 621, 56 N. E. 407 (affg. 85 Ill. App. 289); Kirkwood v. Smith, 72 App. Div. 429, 75 N. Y. S. 1016; Cook v. Jenkins, 79 N. Y. 575; Fries v. Ennis, 8 Pa. Co. Ct. 113; Slaughter v. Danner, 102 Va. 270, 46 S. E. 289; Teacher v. Calder [1899], A. C. 451; Ambler v. Bolton, L. R. 14 Eq. 427, 41 L. J. Ch. 783, 20 W. R. 934; Bate v. Robins, 32 Beav. 73, 55 Eng. Reprint 28.

[37] Wadley v. Jones, 55 Ga. 329; Moore v. Stone, 50 Ga. 157; Carlin v. Donegan, 15 Kans. 495; Smith v. Smith, 93 Maine 253, 44 Atl. 905; Roache v. Pendergast, 3 Harr. & J. (Md.) 33; Lenahan v. Casey, 46 Mont. 367, 128 Pac. 601; Gilliam v. Newland, 37 Okla. 36, 130 Pac. 133; Russell v. Nall, 79 Tex. 664, 15 S. W. 635; Carroll v. Evans, 27 Tex. 262. See also Rush v. First Nat. Bank (Tex. Civ. App.), 160 S. W. 319; Hengy v. Hengy (Tex. Civ. App.), 151 S. W. 1127; Johnson v. Clements, 23 Tex. Civ. App. 112, 54 S. W. 272; Herring v. Herring (Tex. Civ. App.), 51 S. W. 865; Yarwood v. Billings, 31 Wash. 542, 72 Pac. 104.

[38] Lenahan v. Casey, 46 Mont. 367, 128 Pac. 601.

[39] Reybold v. Dodd, 1 Harr. (Del.) 401, 26 Am. Dec. 401; Nims v. Nims, 20 Fla. 204; Jones v. Lester, 77 App. Div. 174, 78 N. Y. S. 1000.

[40] Nisbet v. Nash, 52 Cal. 540.

[41] Collins v. Owens, 34 Ala. 66; Jeter v. Johnson, 110 Ga. 308, 35 S. E. 166; McKaig v. Hebb, 42 Md. 227; Glenn v. Hebb, 12 Gill & J. 271 (Md.); Felder v. Wall, 26 Miss. 595; Rennie v. Crombie, 12 N. J. Eq. 457; Smith v. Fitchett, 56 Hun 473, 10 N. Y. S. 459 (affg. 2 N. Y. S. 261, 15 N. Y. Civ. Proc. 207); Kennedy v. Shilton, 1 Hilt. 546, 9 Abb. Pr. (N. Y.) 157 note; Pine v. Ormsbee, 2 Abb. Pr. (N. S.) (N. Y.) 375; Smith v. Barringer, 74 N. Car. 665.

[42] Rassaert v. Mensch, 17 Cal. App.

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of dissolution were paid.[43] In case of a partnership for a single purpose, at end before suit, it is unnecessary to adjudge dissolution in a decree for an accounting.[44]

§ 724. **Burden of proof.**—The general rules of proof apply in a suit for a partnership accounting, and, of course, the party pleading the affirmative of an issue has the burden of proving it. A partner has the burden of showing authority for a claim made by him.[46] The partner asserting bad faith has, as a general rule, the burden of proving it.[47] A defendant who pleads dissolution and settlement has the burden of proving it.[48] The widow of a surviving partner who charges fraud, must prove her allegations by clear and convincing evidence.[49] The administrator of a partner who had exclusive control of the business and kept firm books, but did not keep accurate accounts, had when sued for a settlement, the burden of showing that his decedent applied firm assets to firm debts.[50]

§ 725. **Reference.**—The question as to whether the defendants are liable to account must be decided before reference to a master to take the account, for accounting may be unnecessary.[51] The right to a reference undoubtedly exists where the answer admits all the essentials necessary to an accounting,[52] un-

637, 120 Pac. 1072; Quinn v. Reed, 148 N. Y. S. 801; Donnelly v. McArdle, 152 App. Div. 805, 137 N. Y. S. 801.

[43] Steinberg v. Eagan, 234 Pa. 291, 83 Atl. 272.

[44] Spencer v. Barnes, 25 Cal. App. 139, 142 Pac. 1088.

[46] See post § 729.

[47] Marcum v. Marcum, 154 Ky. 401, 157 S. W. 1101. See also Costa v. Costa (Mass.), 110 N. E. 309; Navarro v. Lamana (Tex. Civ. App.), 179 S. W. 922.

[48] Walker v. Frierson, 180 Ala. 11, 60 So. 57.

[49] Summerill v. Summerill (N. J. Eq.), 93 Atl. 726.

[50] Marcum v. Marcum, 154 Ky. 401, 157 S. W. 1101.

[51] Smith v. Smith, 135 Ga. 582, 69 S. E. 1110; Adams v. Gaubert, 69 Ill. 585; Vermillion v. Bailey, 27 Ill. 230; Bruner v. Jacobson, 115 Minn. 425, 132 N. W. 995; Jones v. Lester, 77 App. Div. 174, 78 N. Y. S. 1000 (applying Code Civ. Proc., § 1013); Bantes v. Brady, 8 How. Pr. (N. Y.) 216; Dampf's Appeal, 106 Pa. St. 72; Collyer v. Collyer, 38 Pa. St. 257; Driggs v. Morely, 2 Pinn. (Wis.) 403, 2 Chandl. 59.

[52] Wilcoxon v. Wilcoxon, 111 Ill. App. 90; Auld v. Butcher, 2 Kans.

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less the account is taken by the court;[53] or the defendant has pleaded a full settlement;[54] or accepts the plaintiff's statement.[55] And if all the firm property has been sold, and the proceeds properly applied, the court may properly refuse to appoint a master, where the rights of all the parties to the firm property had been determined.[56]

§ 726. **Manner of drawing account.**—The account should include all firm accounts not previously settled, or taken out from the accounting.[57] If the partnership agreement so provides, the court may take cognizance of matters relating to transactions prior to its date, as well as those subsequent.[58] There is no right to determine matters as to a third person not a party.[59] The method of drawing up the account should be to ascertain and state an account as to the partnership and its creditors, then to credit each partner with contributions or advances made by him, then profits or losses should be ascertained, and all claims between the partners as to partnership affairs, settled and one balance struck as the sum owing by one partner to the other, or by the firm to each,[60] although another method may be followed by

135; Bush v. Stamper, 61 S. W. 267, 22 Ky. L. 1592; Gerber v. Jones, 36 Nebr. 126, 54 N. W. 81; Kennett v. Hopkins, 175 N. Y. 496, 67 N. E. 1084, 174 N. Y. 545, 67 N. E. 1084 (affg. 58 App. Div. 407, 69 N. Y. S. 18; affg. 20 Misc. 259, 45 N. Y. S. 797); McPeters v. Ray, 85 N. Car. 462; Conley v. Horner, 10 Okla. 277, 62 Pac. 807; Bonland v. Carpin, 27 S. Car. 235, 3 S. E. 219; Frierson v. Morrow (Tenn.), 48 S. W. 245; Zalinoff v. Hammond [1898], 2 Ch. 92, 67 L. J. Ch. 370; Barnes v. Youngs [1898], 1 Ch. 414.

[53] Roelofs v. Wever, 119 Mich. 334, 78 N. W. 136.

[54] Wynkoop v. Wynkoop, 119 App. Div. 679, 104 N. Y. S. 296.

[55] Diehl v. Dreyer, 84 App. Div. 247, 82 N. Y. S. 770.

[56] Fullenwider v. Bank, 101 Ark. 259, 142 S. W. 149.

[57] Bernie v. Vandever, 16 Ark. 616; Randolph v. Inman, 172 Ill. 575, 50 N. E. 104; Sharp v. Morrow, 6 T. B. Mon. (Ky.) 300; Wiggin v. Fine, 17 Mont. 575, 44 Pac. 75; Boyle v. Hardy, 28 Mo. 390; Parkhurst v. Muir, 7 N. J. Eq. 555; In re Hearns, 214 N. Y. 426, 108 N. E. 816; Price v. Eccles, 73 N. Car. 162; Leinbach v. Wolle, 211 Pa. 629, 61 Atl. 248; Herring v. Herring (Tex. Civ. App.), 51 S. W. 865; Sim v. Sim, 11 Ir. Ch. 310.

[58] Gore v. Vines, 72 W. Va. 783, 79 S. E. 820.

[59] Flinn v. Hanbury, 157 App. Div. 207, 141 N. Y. S. 844.

[60] Garrett v. Robinson, 80 Ala. 192; McCall v. Moschowitz, 14 Daly 16,

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agreement.[61] As said by Mr. Lindley:[62] "The method of taking a partnership account under a judgment in the usual form is as follows: (1) Ascertain how the firm stands as regards nonpartners. (2) Ascertain what each partner is entitled to charge in account with his copartners, remembering, in the words of Lord Hardwicke, that 'each is entitled to be allowed as against the other, everything he has advanced or brought in as a partnership transaction, and to charge the other in the account with what that other has not brought in, or has taken out more than he ought.' (3) Apportion between the partners all profits to be divided or losses to be made good; and ascertain what, if anything, each partner must pay to the others, in order that all cross-claims may be settled. In order, therefore, to take a partnership account, it is necessary to distinguish joint estate from separate estate; joint debts from separate debts; and to determine what gains and what losses are to be placed to the joint account of all the partners, or to the separate accounts of some or one of them exclusively." If the itemized statement of amounts due the parties leaves no doubt as to what was included in the total, it is sufficient without giving details of the several items.[63] But where the master's report is obscure, confused, and so unintelligible that the court can not pass on it satisfactorily, the accounting will be referred again for another report.[64] An auditor to whom reference was made, in an accounting in which there was a dispute as to the date of commencement of the partnership, having

1 N. Y. St. 99, 10 Civ. Proc. 107; Cockerham v. Bosley, 52 La. Ann. 65, 26 So. 814; Neudecker v. Kohlberg, 3 Daly (N. Y.) 407; Strathy v. Crooks, 6 Grant Ch. (U. C.) 162. See also Hicks v. Chadwell, 1 Tenn. Ch. 251.

[61] Kelsey v. Hobby, 16 Pet. (U. S.) 269, 10 L. ed. 961; Hume v. McNees, 10 S. W. 384, 10 Ky. L. 947; Kliger v. Rosenfeld, 120 App. Div. 396, 105 N. Y. S. 214; Lowther v. Lowther, 105 App. Div. 638, 94 N. Y. S. 159; New York Bank-Note Co. v. Hamilton Bank-Note Engraving &c. Co., 56 App. Div. 488, 67 N. Y. S. 827; Thornton v. Proctor, Austr. 94, 3 Rev. Rep. 558; Watney v. Wells, 1 N. R. 82, 32 L. J. Ch. 194, 9 Jur. (N. S.) 396, 11 W. R. 228; Davidson v. Thirkell, 3 Grant Ch. (U. C.) 330.

[62] Lindley Partnership (8 ed.), p. 598.

[63] Shadburne v. Sbarbaro, 182 Ill. App. 54.

[64] Reid v. Freed, 100 Miss. 48, 56 So. 278.

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no power to pass on this question, properly reported the amount which was due each partner on each of the different theories as to the date.[65]

§ 727. **Partnership books and accounts.**—Where a partner has not kept accurate accounts, all doubtful items will be resolved against him, as a general rule,[66] although this will not be done when he is not able or qualified to keep accounts,[67] and, presumably, when there was such reliance on the other partner as to make his conduct fraud, and then the best evidence obtainable will be competent in order to ascertain the true state of affairs.[68] Where both partners were trying to obtain advantage of each other, and the books were kept by one in the absence of the other who could not read or write, and the partner keeping the books obtained the advantage, it was held these things should be considered by the court and the settlement made as nearly as possible in conformity with the books and contract.[69] In an action for an accounting, each partner has the right to inspect the firm books.[70] Where it appears that all the

[65] Hengy v. Hengy (Tex. Civ. App.), 151 S. W. 1127.

[66] Pierce v. Scott, 37 Ark. 308; Marcum v. Marcum, 154 Ky. 401, 157 S. W. 1101; Harman v. Stuart (Ky.), 119 S. W. 210; Archer v. Barry, 62 S. W. 485, 23 Ky. L. 12; Kirwan v. Henry, 16 S. W. 828, 13 Ky. L. 199; Leftwitch v. Leftwitch, 6 La. Ann. 346; Bevans v. Sullivan, 4 Gill (Md.) 383; Mitchell v. Mitchell, 92 Mich. 618, 52 N. W. 1024; Young v. Barras, 74 Mich. 343, 42 N. W. 42; Van Ness v. Van Ness, 32 N. J. Eq. 669 (revd. on other grounds in 32 N. J. Eq. 729); Clements v. Mitchell, 62 N. Car. 3; Gay v. Householder, 71 W. Va. 277, 76 S. E. 440, Ann. Cas. 1914 C, 297n; Knapp v. Edwards, 57 Wis. 191, 15 N. W. 140. See Martinez v. Ong Pong Co., 14 Philippine 726.

[67] Archer v. Barry, 62 S. W. 485, 23 Ky. L. 12; Knapp v. Edwards, 57 Wis. 191, 15 N. W. 140.

[68] Petty v. Haas, 122 Iowa 257, 98 N. W. 104; Bevans v. Sullivan, 4 Gill (Md.) 383; Young v. Barras, 74 Mich. 343, 42 N. W. 42; Schmidt v. Lebby, 11 Rich. Eq. (S. Car.) 329; Myers v. Bennett, 3 Lea (Tenn.) 184; Budeke v. Ratterman, 2 Tenn. Ch. 459; Dimond v. Henderson, 47 Wis. 172, 2 N. W. 73.

[69] Hirshberg v. Ciconett, 146 Ky. 642, 143 S. W. 10.

[70] Stebbins v. Harmon, 17 Hun (N. Y.) 445; Kelly v. Eckford, 5 Paige (N. Y.) 548; Knoch v. Funke, 59 N. Y. Super. Ct. 240, 14 N. Y. S. 477; Saunders v. Duval, 19 Tex. 467; Calloway v. Tate, 1 Hen. & M. (Va.) 9; Millar v. Craig, 6 Beav. 433, 49 Eng. Reprint 893; Walmsley v. Walmsley, 3 Jo. & Lat. 556.

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partners had access to the partnership books, at or about the time the entries were made, the presumption is that the entries were correct, and they are admissible as to all the partners,[71] or their representatives.[72] This has been held even when the books contradicted the partnership articles.[73] Unless the contrary appears, it is presumed that the parties stand on an equal footing as to the books of the firm.[74] Where a partner's account is based on the book entries, there is a stronger presumption that such entries are correct as to him.[75] If a partner made no objection to an item in his copartner's account, in which he credited himself with an amount, and did not offer evidence to show that

[71] Powers v. Dickie, 49 Ala. 81; Desha v. Smith, 20 Ala. 747; Haller v. Willamowicz, 23 Ark. 566; Morgans v. Adel, 76 Cal. xix, 18 Pac. 247; O'Brien v. Hanley, 86 Ill. 278; Eden v. Lingenfelter, 39 Ind. 19; Reno v. Crane, 2 Blackf. (Ind.) 217; Hale v. Philbrick, 47 Iowa 217; Moon v. Story, 8 Dana (Ky.) 226; Carpenter v. Camp, 39 La. Ann. 1024, 3 So. 269; Parker v. Jonte, 15 La. Ann. 290; Armistead v. Spring, 1 Rob. (La.) 567; Jordan v. White, 4 Mart. (N. S.) (La.) 335; Topliff v. Jackson, 12 Gray (Mass.) 565; Howard v. Patrick, 38 Mich. 795; Dunnell v. Henderson, 23 N. J. Eq. 174; Cheever v. Lamar, 19 Hun (N. Y.) 130; Caldwell v. Leiber, 7 Paige (N. Y.) 483; Heartt v. Corning, 3 Paige (N. Y.) 566; Stoughton v. Lynch, 2 Johns. Ch. (N. Y.) 209; Cobb v. Martin, 32 Okla. 588, 123 Pac. 422; Boire v. McGinn, 8 Ore. 466; Congdon v. Aylsworth, 16 R. I. 281, 18 Atl. 247; Richardson v. Wyatt, 2 Desaus, Eq. (S. Car.) 471; Cameron v. Watson, 10 Rich. Eq. (S. Car.) 64; Myers v. Bennett, 3 Lea (Tenn.) 184; Budeke v. Ratterman, 2 Tenn. Ch. 459; Hicks v. Chadwell, 1 Tenn. Ch. 251; Brickhouse v. Hunter, 4 Hen. & M. (Va.) 363, 4 Am. Dec. 528; Fletcher v. Pollard, 2 Hen. & M. (Va.) 544; Brierly v. Cripps, 7 C. & P. 709; Lodge v. Pritchard, 3 DeG., M. & G. 906; Sim v. Sim, 11 Ir. Ch. 310. Compare Sutton v. Mandeville, 1 Cranch (C. C.) 2, Fed. Cas. No. 13648. See Phillips v. Reynolds, 236 Ill. 119, 86 N. E. 193; Hirshberg v. Ciconett, 146 Ky. 642, 143 S. W. 10; Bennett v. McKay, 4 Newfoundl. 178, 462 (1879).

[72] Routen v. Bostwick, 59 Ala. 360; Powers v. Dickie, 49 Ala. 81; Gardner v. Cummings, Ga. Dec. 1; Howard v. Patrick, 38 Mich. 795; Morehouse v. Newton, 3 DeG. & Sm. 307, 13 Jur. 420; Townend v. Townend, 1 Giffard 201, 5 Jur. (N. S.) 506, 7 W. R. 529; In re Wood, 34 Ont. L. 278, 8 Ont. W. N. 583; Browning v. Browning, 5 Newfoundl. 161 (1887). See Cronk v. Crandall, 137 App. Div. 440, 121 N. Y. S. 805.

[73] Gregg v. Hord, 129 Ill. 613, 22 N. E. 528.

[74] Hirshberg v. Ciconett, 146 Ky. 642, 143 S. W. 10.

[75] Donovan v. Clark, 138 N. Y. 631, 33 N. E. 1066.

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the copartner did not properly pay such amount, the copartner's account could not be surcharged with it.[76] A verified pleading attesting the correctness of partnership books adds it is held to their evidentiary value.[77] There is no presumption that entries in firm books are correct as to a dormant partner, who exercised no right of inspection,[78] nor is a retiring partner bound by entries made in firm books after his retirement.[79] There is no presumption that a partner's private books are correct.[80] In the absence of estoppel,[81] the presumption of the correctness of partnership books may be rebutted by a showing of mistake or fraud.[82] Accounts rendered between partners may be competent to show that certain items have been admitted by the parties not to be elements of the partnership account.[83] The failure of defendant partners to make the accounting asked will not deprive the plaintiff of his right to relief when he has produced all the evidence in his power.[84]

§ 728. Conversion of assets into cash.—After the appointment of a receiver he has the sole right to collect debts of a

[76] Donnelly v. McArdle, 152 App. Div. 805, 137 N. Y. S. 801.

[77] Haller v. Willamowicz, 23 Ark. 566; Wendling v. Jennisch, 85 Iowa 392, 52 N. W. 341.

[78] Taylor v. Herring, 10 Bosw. (N. Y.) 447.

[79] Bank of British Columbia v. Delafield, 80 Hun 564, 30 N. Y. S. 600, 62 N. Y. St. 655 (affd. 152 N. Y. 624, 46 N. E. 1144); Clements v. Mitchell, 62 N. Car. 3.

[80] Turnipseed v. Goodwin, 9 Ala. 372; Adams v. Funk, 53 Ill. 219; Wheatley v. Wheeler, 34 Md. 62; Sim v. Sim, 11 Ir. Ch. 310.

[81] Wendling v. Jennisch, 85 Iowa 392, 52 N. W. 341.

[82] Roberts v. Eldred, 73 Cal. 394, 15 Pac. 16; Butler v. Beech, 55 Cal. 28; Donaldson v. Donaldson, 142 Ill. App. 21; Peden v. Mail, 118 Ind. 560, 20 N. E. 446; Bannon v. Hawkins, 35 S. W. 636, 18 Ky. L. 150; Greer v. Greer, 23 S. W. 866, 15 Ky. L. 472; Kirwan v. Henry, 16 S. W. 828, 13 Ky. L. 199; Moon v. Story, 8 Dana (Ky.) 226; James v. Jacobs, 147 N. Y. 710, 42 N. E. 723 (affg. 71 Hun 176, 24 N. Y. S. 1126); Donovan v. Clark, 138 N. Y. 631, 33 N. E. 1066; Boyd v. Foot, 5 Bosw. (N. Y.) 110; Barrett v. Kling, 16 N. Y. S. 92, 40 N. Y. St. 823; Keys v. Baldwin, 10 Ohio Dec. (Reprint) 271, 19 Cinc. L. Bul. 376; Ziegler's Appeal, 2 Sad. (Pa.) 351, 4 Atl. 837; Johnston v. Ballard, 83 Tex. 486, 18 S. W. 686.

[83] Barry v. Barry, 3 Cranch. C. C. 120, Fed. Cas. No. 1060; Browning v. Browning, 5 Newfoundl. 161 (1887).

[84] Oustad v. Hahn, 27 N. Dak. 334, 146 N. W. 557.

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firm, as against the partners, or their assignees.[85] The general practice in an action for a partnership accounting and dissolution is to sell all of the property, and convert it into cash, unless there is a valid and honest agreement to divide the assets in kind.[86] It was said in one case:[87] "Taking into consideration the fact that the assets were not equal to the liabilities, that the first claim upon the assets rested with the creditors, and that their right to present their claims at any subsequent stage of the litigation was still existent, we think their interests were proper

[85] Adams v. Haskell, 6 Cal. 113, 65 Am. Dec. 491; Murphy v. DuBerg, 11 Abb. N. Cas. (N. Y.) 112; Tillinghast v. Champlin, 4 R. I. 173, 67 Am. Dec. 510; Dixon v. Paddock, 104 Va. 387, 51 S. E. 841; Irvine v. Hervey, 47 Nova Scotia 310.

[86] Burns v. Rosenstein, 135 U. S. 449, 34 L. ed. 193, 10 Sup. Ct. 817; Olcott v. Wing, 4 McLean (U. S.) 15, Fed. Cas. No. 10481; Montross v. Mabie, 30 Fed. 234; Wiegand v. Copeland, 14 Fed. 118, 7 Sawy. 442; Wulff v. San Joaquin County Super. Ct., 110 Cal. 215, 42 Pac. 638, 52 Am. St. 78; Hall v. Lonkey, 57 Cal. 80; Stower v. Kamphefner, 6 Cal. App. 80, 91 Pac. 424; Dickinson v. Dickinson, 29 Conn. 600; Sigourney v. Mume, 7 Conn. 324; Tomlinson v. Ward, 2 Conn. 396; Renfrow v. Pearce, 68 Ill. 125; Marcum v. Marcum, 154 Ky. 401, 157 S. W. 1101; Whitney v. Whitney, 88 S. W. 311, 27 Ky. L. 1197, 77 S. W. 206, 25 Ky. L. 1142, 115 Ky. 552, 74 S. W. 194, 24 Ky. L. 2465; Pratt v. McHatton, 11 La. Ann. 260; Kohn v. Marsh, 3 Rob. (La.) 48; Loney v. Bayly, 45 Md. 447; Filbrun v. Ivers, 92 Mo. 388, 4 S. W. 674; Murphy v. Patterson, 24 Mont. 591, 63 Pac. 380; Rhodes v. Williams, 12 Nev. 20; Bogardus v. Reed, 160 App. Div. 294, 145 N. Y. S. 597; Wing v. Bliss, 138 N. Y. 643, 34 N. E. 513 (affg. 8 N. Y. S. 500); Waugh v. Mitchell, 21 N. Car. 510; Snyder Mfg. Co. v. Snyder, 54 Ohio St. 86, 43 N. E. 325, 31 L. R. A. 657; Fleming v. Carson, 37 Ore. 252, 62 Pac. 374; Slemmer's Appeal, 58 Pa. St. 168, 98 Am. Dec. 255; Watson v. Williamson (Tex. Civ. App.), 76 S. W. 793; Pierce v. Trigg, 10 Leigh (Va.) 406; Rowlands v. Evans, 30 Beav. 302, 31 L. J. Ch. 265, 8 Jur. (N. S.) 88; Wild v. Milne, 26 Beav. 504, 53 Eng. Reprint 993; Burdon v. Barkus, 4 DeG., F. & J. 42; Cook v. Collingridge, Jac. 617, 1 L. J. Ch. (O. S.) 74, 23 R. R. 155, 767; Hall v. Barrows, 9 Jur. (N. S.) 483, 1 N. R. 543, 8 L. T. 227, 11 W. R. 525; Page v. Slade, 54 L. J. Ch. 1131; Heath v. Fisher, 38 L. J. Ch. 14; Crawshay v. Collins, 2 Russ. 325; Crawshay v. Maule, 1 Swanst. 495, 36 Eng. Reprint 479; Waters v. Taylor, 2 Ves. & B. 299; Featherstonhaugh v. Fenwick, 17 Ves. Jr. 298, 11 Rev. Rep. 77; Class v. Marshall, 33 Wkly. Rep. 409; Cragg v. Ford, 1 Y. & Coll. 280, 20 Eng. Ch. 280. Compare Rassaert v. Mensch, 17 Cal. App. 637, 120 Pac. 1072.

[87] Wulff v. Superior Court, 110 Cal. 215, 52 Am. St. 78.

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subject-matter for the cognizance of the court in dealing with these assets, notwithstanding they were in no way parties to the record. And, taking all the facts into consideration, we see no excess of power exercised by the trial court in ordering the sale. It must be conceded that the court, by its receiver, had the power to sell perishable property, and, upon the showing here made, this business was clearly property of that character. The assets consisted of articles of trade and the good-will of the business. The tangible assets were becoming dissipated and lost in spite of care and skill in the management of them, and without these assets the good-will would seem to be entirely valueless. These two classes of property were indissolubly connected, and, if the court had the power to sell either, it had the power to sell both. Likewise, the book accounts; if any part of these assets could be sold, and it was for the best interests of the copartnership and the creditors that these accounts should go with the business, the court had the power to so adjudge. A litigious partner, by means incident to litigation, might be able to delay the entry of a decree of dissolution for years, and thereby encompass the utter destruction of the entire partnership assets; and it would seem, in the interest of parties having claims upon these assets, that a court of equity was vested with the right to give relief by converting them into money. In a proper case, as where litigation has necessitated a postponement of material issues involved, the court may order a partial distribution.[88] The partnership real estate should be included in the property sold,[89] and also the good-will of the business.[90] As said in one case:[91] "Upon the dissolution of a trading copartnership

[88] Marcum v. Marcum, 154 Ky. 401, 157 S. W. 1101.

[89] Tarabino v. Nicoli, 5 Colo. App. 545, 39 Pac. 362; Mauck v. Mauck, 54 Ill. 281; Shearer v. Shearer, 98 Mass. 107; Barron v. Mullin, 21 Minn. 374; Pierce v. Covert, 39 Wis. 252.

[90] Wulff v. San Joaquin County Super. Ct., 110 Cal. 215, 42 Pac. 638, 52 Am. St. 78; Whitney v. Whitney, 88 S. W. 311, 27 Ky. L. 1197, 115 Ky. 552, 74 S. W. 194, 24 Ky. L. 2465; Mitchell v. Read, 84 N. Y. 556 (affg. 19 Hun 418); Dougherty v. Van Nostrand, 1 Hoffm. (N. Y.) 68; Snyder Mfg. Co. v. Snyder, 54 Ohio St. 86, 43 N. E. 325, 31 L. R. A. 657. See Moore v. Rawson, 199 Mass. 493, 85 N. E. 586.

[91] Snyder Mfg. Co. v. Snyder, 54

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its assets, including the good-will of the business, may be sold as a whole, either by the partners directly, or through a receiver under an order made by a court in a case to which they are parties; and that a purchaser thereof under either method of sale is entitled to continue the business as the successor of the firm and make use of the firm name for that purpose. * * * If it is desired to limit the right of the purchaser or his vendee in the use of the firm name, or exclude such right altogether, it should be done by stipulation in the contract when the sale is made by the partners, or by a provision to that effect in the order, when the sale is made through the court." However, the order for sale should not include property which it is not necessary to sell,[92] property the sale of which will give one partner an unfair advantage,[93] nor property which the firm does not own.[94] Where a wife of a partner has a dower right in partnership real estate, the sale must be made subject to her interest.[95] If one partner purchases the property at the sale, it is held that the other partner may avoid it, on the ground that they stand in a trust relation to each other.[96] Where there was a suit to dissolve a solvent firm, and no attempt was made to settle with creditors, and litigation had lasted three years, a judgment creditor was permitted to levy on assets in the hands of the receiver pendente lite, with orders to convert them into cash, and hold for further orders.[97] The court should provide for the filing of all claims before final distribution, in order to pass on their validity.[98]

Ohio St. 86, 43 N. E. 325, 31 L. R. A. 657.

[92] Duden v. Maloy, 63 Fed. 183, 11 C. C. A. 119; Pratt v. McHatton, 11 La. Ann. 260.

[93] Kelley v. Shay, 206 Pa. 208, 55 Atl. 925; Rowell v. Rowell, 122 Wis. 1, 99 N. W. 473; Pawsey v. Armstrong, 18 Ch. Div. 698, 50 L. J. Ch. 683; Knight v. Marjoribanks, 2 Hall & Tw. 308, 47 Eng. Reprint 1700; Blyth v. Blyth, 4 L. T. (N. S.) 536.

[94] Nichols v. Murphy, 136 Ill. 380, 26 N. E. 509; Brush v. Jay, 113 N. Y. 482, 21 N. E. 184; Graham v. McCulloch, L. R. 20 Eq. 397.

[95] Chase v. Angell, 148 Mich. 1, 108 N. W. 1105.

[96] Cresse v. Loper, 72 N. J. Eq. 784, 65 Atl. 1001; Livingston v. Livingston, 7 Ont. W. N. 406 (mod. 26 Ont. L. 246).

[97] Abrahams v. Beneke, 155 App. Div. 525, 140 N. Y. S. 753.

[98] Leppel v. Lumley, 19 Colo. App. 413, 75 Pac. 605; Hubbard v. Curtis,

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§ 729. Charges and credits.—Each partner should be credited in stating the account, with each and every contribution which he has made to partnership assets. These may be shown by the books,[99] or by other evidence.[1] He is entitled to be credited for all payments made from his own property for debts of the firm, or its losses or legitimate expenses,[2] including interest or discount charges.[3] A partner may be reimbursed for paying

8 Iowa 1, 74 Am. Dec. 283; Johnson v. Johnson, 132 Iowa 457, 107 N. W. 802; Holloway v. Turner, 61 Md. 217; Berry v. Folkes, 60 Miss. 576; Lawson v. Dunn, 66 N. J. Eq. 90, 57 Atl. 415; Richardson v. Hatch (N. J.), 55 Atl. 1115; Matter of Brown, 3 Edw. (N. Y.) 384; Law v. Ford, 2 Paige (N. Y.) 310; Mitchell &c. Furniture Co. v. Runk, 7 Ohio Dec. (Reprint) 491, 3 Cin. Law Bul. 538; Gordon v. Moore, 134 Pa. St. 486, 19 Atl. 753; McCay v. Black, 36 Leg. Int. (Pa.) 471.

[99] Murphey v. Bush, 122 Ga. 715, 50 S. E. 1004; Ernst v. Schmitz, 207 Ill. 604, 69 N. E. 923; Rosenstiel v. Gray, 112 Ill. 282; Parker v. Ramsbottom, 5 D. & R. 138, 3 B. & C. 257. Compare Moore v. Rawson, 199 Mass. 493, 85 N. E. 586.

[1] Consaul v. Cummings, 24 App. Cas. (D. C.) 36; Van Fleet v. King, 33 App. Cas. (D. C.) 47; McAllister v. Payne, 108 Ga. 517, 34 S. E. 165; Snell v. DeLand, 136 Ill. 533, 27 N. E. 183; Young v. Potter, 150 Mich. 375, 114 N. W. 215; Hake v. Coach, 114 Mich. 558, 72 N. W. 623; Randle v. Richardson, 53 Miss. 176; Neal v. Abel, 103 App. Div. 414, 92 N. Y. S. 1045; Hebblethwaite v. Flint, 115 App. Div. 597, 101 N. Y. S. 43; Finletter v. Baum, 207 Pa. 361, 56 Atl. 941; Frierson v. Morrow (Tenn.), 48 S. W. 245; Barber v. Morgan (Tex. Civ. App.), 76 S. W. 319; Dixon v. Paddock, 104 Va. 387, 51 S. E. 841; Gay v. Householder, 71 W. Va. 277, 76 S. E. 440, Ann. Cas. 1914 C, 297n; Moore v. Wheeler, 10 W. Va. 35; Cruikshank v. McVicar, 8 Beav. 106, 14 L. J. Ch. 41, 50 Eng. Reprint 42.

[2] Lewis v. Loper, 54 Fed. 237; Clark v. Gridley, 41 Cal. 119; Smith v. Brush, 11 Conn. 359; Brownell v. Steere, 128 Ill. 209, 21 N. E. 3 (affg. 29 Ill. App. 358); Harman v. Stuart (Ky.), 119 S. W. 210; Craig v. Warner, 216 Mass. 386, 103 N. E. 1027; Fletcher v. Reed, 131 Mass. 312; Harvey v. Varney, 104 Mass. 436; Goldman v. O'Hara, 164 Mich. 612, 130 N. W. 352; Hake v. Coach, 114 Mich. 558, 72 N. W. 623; Pierce v. Pierce, 89 Mich. 233, 50 N. W. 851; In re Welch, 77 Misc. 427, 137 N. Y. S. 941; Van Bokkelen v. Berdell, 130 N. Y. 141, 29 N. E. 254 (revg. 3 N. Y. S. 333); Robertson v. Read, 17 Grat. (Va.) 544; Burdon v. Barkus, 4 DeG., F. & J. 42, 8 Jur. (N. S.) 656; Storm v. Cumberland, 18 Grant Ch. (U. C.) 245. But see Winnard v. Clinton, 233 Ill. 320, 84 N. E. 261, in which expenses incurred in auditing the books were not charged to the firm.

[3] Marcum v. Marcum, 154 Ky. 401,

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usury after death of a partner on money borrowed by the firm, when usury had been paid on the debt in good faith before the other partner's death.[4] If he compromises a debt, he should be credited only with the amount paid.[4a] If he pays a note without suit, he can not recover for attorney's fees stipulated in the note.[5] Personal expenses must be clearly proved, where there is a right to recover them,[6] nor is it sufficient to show by a witness engaged in the same business the average expenses which would be incurred in such business.[7] If no accounts have been kept, testimony of experts has been permitted to show the amount which should be credited for expenses.[8] Credit may be allowed for loss by defendant partners in purchasing live stock from the firm at a fixed price.[9] In order to obtain credit for money expended for the partnership, or compensation for services, a partner must show authority from the firm to receive it,[10] and has the burden of proving his right to such allowance.[11] The burden is also on the partner claiming compensation to prove it.[12] Under some circumstances credits may be allowed for money paid for improvements.[13] A partner who carries on business in his own name for his own benefit and who uses partnership property

157 S. W. 1101; Fletcher v. Reed, 131 Mass. 312; Bundy v. Youmans, 44 Mich. 376, 6 N. W. 851.

[4] Marcum v. Marcum, 154 Ky. 401, 157 S. W. 1101.

[4a] Filbrun v. Ivers, 92 Mo. 388, 4 S. W. 674.

[5] Berah v. O'Niell, 121 La. 733.

[6] Sandberg v. Scougale, 75 Wash. 313, 134 Pac. 1051.

[7] Sandberg v. Scougale, 75 Wash. 313, 134 Pac. 1051.

[8] Lamb v. Rowan, 83 Miss. 45, 35 So. 427, 690.

[9] Fuller v. El Paso Live Stock Commission Co. (Tex. Civ. App.), 174 S. W. 930.

[10] Stone v. Fowlkes, 29 App. Cas. (D. C.) 379; Consaul v. Cummings, 24 App. Cas. (D. C.) 36; Baker v. Cummings, 8 App. Cas. (D. C.) 515; Morgart v. Smouse, 112 Md. 615, 77 Atl. 137; Willard v. Bullen, 41 Ore. 25, 67 Pac. 924, 68 Pac. 422; Willock v. Dubbs, 32 Pitts. L. J. (N. S.) (Pa.) 250; Gorman v. Madden, 27 S. Dak. 319, 131 N. W. 290; Dixon v. Paddock, 104 Va. 387, 51 S. E. 841; Barrett v. Hartley, L. R. 2 Eq. 789, 12 Jur. (N. S.) 426; Macdonald v. Richardson, 1 Giffard, 81, 5 Jur. (N. S.) 9, 10 L. T. (N. S.) 166; Whittle v. McFarlane, 1 Knapp 311, 12 Eng. Reprint 338.

[11] Keller v. Keller, 154 App. Div. 919, 139 N. Y. S. 87.

[12] Cole v. Cole (Ark.), 177 S. W. 915.

[13] Harris v. Stevenson, 110 Ark. 632, 162 S. W. 769.

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therefor is not entitled to have such business considered partnership business, and is chargeable on an accounting with reasonable rent for the use of the partnership property; that is, with the fair and customary rental value for the time during which he used it as his own.[14] Individual claims between partners should not be credited or charged in any case.[15] Thus a claim by one partner that he invested in another enterprise money which a copartner promised to repay him, is not a matter to be charged in a partnership accounting.[16] Even though there are only two partners, claims between them which are not connected with the partnership, should not be credited.[17] On a dissolution agreement where the continuing partners were authorized to deduct all existing liabilities in ascertaining the plaintiff partner's interest, they were not limited to liabilities entered on the firm books.[18] All money drawn from the firm by a partner, and any other firm property which has been appropriated to his individual use, or debts owing by him to the firm should be charged against him,[19] together with any losses which have been caused by his neglect, or failure in performance of partnership duties,[20]

[14] Painter v. Wilcox, 52 Colo. 639, 125 Pac. 503.

[15] Dennis v. Gordon, 163 Cal. 427, 125 Pac. 1063; Byassee v. Evans, 143 Ky. 415, 136 S. W. 857; Shearman v. Cameron, 76 N. J. Eq. 426, 74 Atl. 979.

[16] Bishop v. Pendley, 138 Ga. 738, 76 S. E. 63.

[17] Payne v. Martin, 39 Colo. 265, 89 Pac. 46.

[18] Jarvie v. Arbuckle, 163 App. Div. 199, 148 N. Y. S. 189.

[19] Couch v. Woodruff, 63 Ala. 466; Clark v. Gridley, 41 Cal. 119; Chandler v. Sherman, 16 Fla. 99; Harman v. Stuart (Ky.), 119 S. W. 210; Archer v. Barry, 62 S. W. 485, 23 Ky. L. 12; Stiles v. Haight, 124 App. Div. 60, 108 N. Y. S. 136; Phelan v. Hutchison, 62 N. Car. 116, 93 Am. Dec. 602; Lay v. Emery, 8 N. Dak. 515, 79 N. W. 1053; Bingham v. Keylor, 25 Wash. 156, 64 Pac. 942; Hart v. Hart, 117 Wis. 639, 94 N. W. 890; Fereday v. Wightwick, 1 Russ. & M. 45. See Walcott v. Hanaford, 2 Porto Rico Fed. 444; Gorman v. Madden, 27 S. Dak. 319, 131 N. W. 290.

[20] Gillett v. Hall, 13 Conn. 426; Randolph v. Inman, 71 Ill. App. 176; Yetzer v. Applegate, 83 Iowa 726, 50 N. W. 66; Webb v. Fordyce, 55 Iowa 11, 7 N. W. 385; Lee v. Lashbrooke, 8 Dana (Ky.) 214; Richard v. Monton, 109 La. 465, 33 So. 563; Webber v. Webber, 146 Mich. 31, 109 N. W. 50; Jessup v. Cook, 6 N. J. L. 434; Kennett v. Hopkins, 58 App. Div. 407, 69 N, Y. S. 18 (affd. 174 N. Y. 545, 67 N. E. 1084); McCoy v. Crossfield, 54 Ore. 591, 104 Pac. 423; Lyons v. Lyons, 207 Pa.

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but not with losses which are due to honest mistakes.[21] Where one partner was permitted to continue the business during a dissolution suit after the refusal to appoint a receiver on the other partner's application, he must account for the other's share in profits up to the time of dissolution.[22] One partner in the cultivation of land is not permitted to share in crops raised during a time when he contributed nothing to aid in the cultivation of the farm.[23] A partner should be charged with profits which he prevented the other partner from making by excluding him wrongfully from the business.[24] A partner may be charged with interest on a sum withdrawn in excess of his share.[25] And under some circumstances, it is proper to charge him with interest on liquidated amounts due the firm.[26] A partner who excluded his copartner from the business, or who has assumed the payment of debts from such assets, is charged with the receipts of the business, credited with the reasonable and legitimate expenses of conducting it and winding it up, and whatever balance remains is to be divided as profits.[27] A partner's share is finally determined by his ratable proportion of the remaining funds, after creditors of the firm have been paid, and the partners have each been credited with the amounts due to them from the partnership, and charged with the amounts due to the firm from them.[28]

7, 56 Atl. 54, 99 Am. St. 779; Fairfield v. Kreps, 33 Pitts. L. J. (N. S.) (Pa.) 407; Devall v. Burbridge, 6 Watts & S. (Pa.) 529; Moore v. Wheeler, 10 W. Va. 35.

[21] Day v. Lockwood, 24 Conn. 185; Leon Exch. Bank v. Gardner, 104 Iowa 176, 73 N. W. 591.

[22] Zimmerman v. Harding, 227 U. S. 489, 57 L. ed. 608, 33 Sup. Ct. 387.

[23] Jenkins v. Jenkins, 66 Ore. 12, 132 Pac. 542.

[24] Zimmerman v. Harding, 227 U. S. 489, 57 L. ed. 608, 33 Sup. Ct. 387.

[25] Ferguson v. Cripps, 87 Conn. 241, 87 Atl. 792.

[26] Buckley v. Kelly, 70 Conn. 411, 39 Atl. 601; Snell v. Taylor, 182 Ill. 473, 55 N. E. 545 (affg. 79 Ill. App. 462); Randolph v. Inman, 172 Ill. 575, 50 N. E. 104; Moore v. Rawson, 185 Mass. 264, 70 N. E. 64; Porter v. Long, 136 Mich. 150, 98 N. W. 990; Brenner v. Carter, 203 Pa. St. 75, 52 Atl. 178.

[27] Howell v. Harvey, 5 Ark. 270, 39 Am. Dec. 376; Dale v. Hogan, 39 Mo. App. 646; Koelz v. Brinkman, 50 W. Va. 270, 40 S. E. 578.

[28] Glover v. Hembree, 82 Ala. 324, 8 So. 251; Archer v. Barry, 62 S. W. 485, 23 Ky. L. 12; Snyder v. O'Beirne, 132 Mich. 340, 93 N. W. 872; Beller v. Murphy, 139 Mo. App. 663, 123 S. W. 1029; Jarvie v. Arbuckle, 163 App. Div. 199, 148 N. Y. S. 189;

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These rules as to the charging and crediting of a partner are often modified because of agreements between the partners, either in original articles, or later made, if in good faith.[29] An item should not be made a double charge.[30] And where a defendant elected to credit payments to the principal account, he can not change his election and credit them to an interest account.[31] The firm is charged with what each partner has contributed to it,[32] but with nothing which has not become the property of the firm, as distinguished from the property of one of the partners even though used in firm business.[33]

§ 730. **Decision.**—The important matters to be embraced in the decision, findings, or report on accounting should be the amount of firm assets, the claims against it, and the share of each

Hagenbuckle v. Schultz, 69 Hun 183, 23 N. Y. S. 611; Wanby v. Jahn, 34 Pitts. L. J. (Pa.) (N. S.) 91; Kennedy v. Hill, 89 S. Car. 462, 71 S. E. 974; Gresham v. Harcourt, 93 Tex. 149, 53 S. W. 1019 (revg. 50 S. W. 1058); Koelz v. Brinkman, 50 W. Va. 270, 40 S. E. 578; Moore v. Wheeler, 10 W. Va. 35.

[29] Brooklyn Trust Co. v. McCutchen, 189 Fed. 273; Richards v. Fraser, 136 Cal. 460, 60 Pac. 83; Clemens v. Crane, 234 Ill. 215, 84 N. E. 884; Hetzel v. Fadner, 167 Ill. App. 92; Levi v. Karrick, 8 Iowa 150; Ferguson v. Johnson, 2 Ky. Op. 549; Stevens v. Yeatman, 19 Md. 480; Young v. Potter, 150 Mich. 375, 114 N. W. 215; Loveland v. Peter, 108 Mich. 154, 65 N. W. 748; Pardue v. McCollum, 116 Mo. App. 603, 92 S. W. 757; Leighton v. Clarke, 42 Nebr. 427, 60 N. W. 875; Morrill v. Weeks, 70 N. H. 178, 46 Atl. 32; Van Horn v. Van Horn (N. J.), 20 Atl. 826; Parkhurst v. Muir, 7 N. J. Eq. 555; Langell v. Langell, 17 Ore. 220, 20 Pac. 286; Manship v. Newton, 94 S. Car. 260, 77 S. E. 941; Becker v. Hill, 20 Lanc. L. Rev. 345; Coventry v. Barclay, 33 Beav. 1, 2 New Rep. 375; Featherstonhaugh v. Turner, 25 Beav. 382, 28 L. J. Ch. 812; Thornton v. Proctor, 1 Austr. 94, 3 Rev. Rep. 358; Luckie v. Forsyth, 3 Jo. & Lat. 388; Worthington v. Macdonald, 9 Can. Sup. Ct. 327.

[30] Lovejoy v. Bailey, 214 Mass. 134, 101 N. E. 63.

[31] Keller v. Keller, 154 App. Div. 919, 139 N. Y. S. 87.

[32] Boskowitz v. Nickel, 97 Cal. 19, 31 Pac. 732; Durham v. Sumpter, 32 S. W. 257, 17 Ky. L 655; Imeson v. Schriver, 11 S. W. 598, 11 Ky. L. 71; Mitchell v. Mitchell, 92 Mich. 618, 52 N. W. 1024; Westerfield v. Price, 80 Hun 401, 30 N. Y. S. 356; Schulte v. Anderson, 45 N. Y. Super. Ct. 489.

[33] Gillett v. Hall, 13 Conn. 426; Grubbs v. McIlvain, 36 S. W. 16, 18 Ky. L. 383; Plumly's Appeal, 1 Pa. 177, 16 Atl. 728.

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partner in the balance.[84] The findings should embrace all matters submitted.[85] The findings are bad if objected to, where they fail to find on a matter which was properly submitted,[86] or when there is a material finding as to a matter not submitted, and not in litigation.[87] The finding is not objectionable because it contains an immaterial finding which is not in issue, as where the principal issue was the existence of a partnership, and the court also found its duration which was immaterial.[88] Laches may cause a partner to lose his right to object to a defective finding,[89] and the court may correct the finding, if it has sufficient facts

[84] Van Tine v. Hilands, 142 Fed. 613; Zimmerman v. Huber, 29 Ala. 379; Haight v. Haight, 151 Cal. 90, 90 Pac. 197; Hart v. Finigan, 71 Cal. 578, 12 Pac. 682; Stower v. Kamphefner, 6 Cal. App. 80, 91 Pac. 424; Durphy v. Pearsall, 6 Cal. App. 54, 91 Pac. 407; Johnson v. Sanford, 13 Conn. 461; Nims v. Nims, 20 Fla. 204; Brockman v. Aulger, 12 Ill. 277; Lannan v. Clavin, 3 Kans. 17; Young v. Winkley, 191 Mass. 570, 78 N. E. 377; Johnson v. Ewald, 82 Mo. App. 276; Kennett v. Hopkins, 174 N. Y. 545, 67 N. E. 1084 [affg. 58 App. Div. 407, 69 N. Y. S. 18]; Rodgers v. Clement, 162 N. Y. 422, 56 N. E. 901, 76 Am. St. 342 (revg. 15 App. Div. 561, 44 N. Y. S. 516); Matter of Muller, 96 App. Div. 619, 88 N. Y. S. 673; McCall v. Moschowitz, 14 Daly 16, 1 N. Y. St. 99, 10 Civ. Proc. 107; Quinn v. Reed, 85 Misc. 510, 148 N. Y. S. 801; Kapp v. Barthan, 1 E. D. Smith (N. Y.) 622; Powell v. Ford, 4 Lea (Tenn.) 278; Kahn v. Central Smelting Co., 2 Utah 371 (revd. 102 U. S. 641, 26 L. ed. 266); Koelz v. Brinkman, 50 W. Va. 270, 40 S. E. 578; Ciscel v. Wheatley, 27 Wis. 618; Smith v. Crooks, 3 Grant Ch. (U. C.) 321.

[85] Doudell v. Shoo, 20 Cal. App. 424, 129 Pac. 478; Levi v. Karrick, 8 Iowa 150; Hengy v. Hengy (Tex. Civ. App.), 151 S. W. 1127.

[86] Day v. Lockwood, 24 Conn. 185; Laswell v. Robbins, 39 Ill. 210; Lyons v. Lyons, 199 Pa. St. 302, 48 Atl. 1079; Eaton's Appeal, 66 Pa. St. 483.

[87] Kennett v. Hopkins, 174 N. Y. 545, 67 N. E. 1084 [affg. 58 App. Div. 407, 69 N. Y. S. 18]; Bullock v. Bemis, 51 Hun 637, 3 N. Y. S. 390; Bouton v. Bouton, 42 How. Pr. (N. Y.) 11 [revg. 40 How. Pr. 217]; Green v. Castleberry, 77 N. Car. 164; Shipman v. Fletcher, 83 Va. 349, 2 S. E. 198.

[88] Doudell v. Shoo, 20 Cal. App. 424, 129 Pac. 478.

[89] Duden v. Maloy, 63 Fed. 183, 11 C. C. A. 119; Pond v. Clark, 24 Conn. 370; Whalen v. Stephens, 193 Ill. 121, 61 N. E. 921 [affg. 92 Ill. App. 235]; Donnelly v. McArdle, 152 App. Div. 805, 137 N. Y. S. 801; Smith v. Fitchett, 56 Hun 473, 10 N. Y. S. 459, 31 N. Y. St. 606; Jones v. Jones, 36 N. Car. 332.

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before it.[40] The judgment in an action for accounting and dissolution should fix the terms of the dissolution,[41] and its date.[42]

§ 731. Decree.—All matters in controversy should be adjudicated, and the distribution of all firm assets provided for,[43] and it is customary to adjudge the payment of a balance due from one partner to another.[44] Payment of such balance should not be decreed on partial settlement,[45] or before selling the partner-

[40] Patterson v. Kellogg, 53 Conn. 38, 22 Atl. 1096; Lobb's Appeal, 3 Walk (Pa.) 374.

[41] Lyon v. Tweddell, 17 Ch. D. 529, 45 J. P. 680.

[42] Dumont v. Ruepprecht, 38 Ala. 175; Durbin v. Barber, 14 Ohio 311; Barclay v. Barrie, 209 N. Y. 40, 102 N. E. 602; Besch v. Frolich, 7 Jur. 73, 12 L. J. Ch. 118.

[43] Nothen v. Tatum, 164 Ala. 368, 51 So. 17; Moran v. McInerney, 129 Cal. 29, 61 Pac. 575; Nims v. Nims, 20 Fla. 204; Veneman v. Ruckle, 120 Ill. App. 251; Levi v. Karrick, 8 Iowa 150; Lannan v. Clavin, 3 Kans. 17; Stark v. Howcott, 118 La. 489, 43 So. 61; Tyng v. Thayer, 8 Allen (Mass.) 391; Lenahan v. Casey, 46 Mont. 367, 128 Pac. 601; Pierson v. Garrison, 83 N. J. Eq. 334, 91 Atl. 829; Gimpel v. Wilson, 10 Misc. 153, 30 N. Y. S. 942; Williams v. Lindblom, 142 N. Y. 682, 37 N. E. 825 [affg. 68 Hun 173, 22 N. Y. S. 678]; Dickerson v. Wilcoxon, 97 N. Car. 309, 1 S. E. 636; Oglesby v. Thompson, 59 Ohio St. 60, 51 N. E. 878; Peck v. Cavagna, 7 Ohio Super. Ct. Com. Pl. 142; Durkheimer v. Heilner, 24 Ore. 270, 33 Pac. 401, 34 Pac. 475; Ashley v. Williams, 17 Ore. 441, 21 Pac. 556; McGinn v. Benner, 22 Pa. Super. Ct. 134; Becker v. Hill, 20 Lanc. L. Rev. (Pa.) 345; Lantz v. Tumlin, 74 W. Va. 196, 81 S. E. 820; Gore v. Vines, 72 W. Va. 783, 79 S. E. 820; Hyre v. Lambert, 37 W. Va. 26, 16 S. E. 446; Carper v. Hawkins, 8 W. Va. 291; Strang v. Thomas, 114 Wis. 599, 91 N. W. 237; Green v. Stacy, 90 Wis. 46, 62 N. W. 627; Singer v. Heller, 40 Wis. 544. See Wedderburn v. Wedderburn, 2 Keen 722, 15 Eng. Ch. 722.

[44] Taylor v. Peterson, 1 Idaho 513; McGillvray v. Moser, 43 Kans. 219, 23 Pac. 96; Tenney v. Simpson, 37 Kans. 579, 15 Pac. 512; Swafford v. White, 28 Ky. L. 119, 89 S. W. 129; Cazeau v. Faget, 11 Rob. (La.) 10; Young v. Winkley, 191 Mass. 570, 78 N. E. 377; Robinson v. Simmons, 146 Mass. 167, 15 N. E. 558, 4 Am. St. 299; McLean v. McLean, 109 Mich. 258, 67 N. W. 118; Wyatt v. Sweet, 48 Mich. 539, 12 N. W. 692, 13 N. W. 525; Raymond v. Came, 45 N. H. 201; White v. Reed, 124 N. Y. 468, 26 N. E. 1037 [mod. 58 N. Y. Super. Ct. 333, 11 N. Y. S. 575]; Reilly v. Freeman, 109 N. Y. App. Div. 4, 95 N. Y. S. 1069 [affd. in 184 N. Y. 610, 77 N. E. 1196]; Hollister v. Simonson, 36 App. Div. 63, 55 N. Y. S. 372; Scott v. Pinkerton, 3 Edw. Ch. (N. Y.) 70; Yarwood v. Billings, 31 Wash. 542, 72 Pac. 104; Steele v. Moore, 71 W. Va. 436, 76 S. E. 850; Strang v. Thomas, 114 Wis. 599, 91 N. W. 237.

[45] Steele v. Moore, 71 W. Va. 436, 76 S. E. 850.

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ship property and applying the proceeds to the debts, including a firm liability to one partner.[46] It seems that firm liabilities should be adjusted to the satisfaction of creditors, before final decree.[47] Equity may compel a partner to assign to the firm patent rights adjudged to belong to it, and in case of his refusal appoint a trustee to make the assignment.[48] The decree should be conclusive in regard to all partners as to partnership affairs.[49] However, a partnership dissolution decree has been held effective, though it did not provide for the disposition of certain notes given by the defendant to the plaintiff before the account was taken.[50] Ordinarily separate judgments should be rendered as to each partner,[51] although there may be such joint interests of contract[52] or tort between two of the parties as against a third that a joint judgment may be rendered against them.[53] It is not improper to award all the firm assets to one partner who assumed the debts, with a recovery against the other partners.[53a] The judgment should conform to the findings,[54] and to the issues made by the pleadings,[55] though a judgment in terms indefinite or

[46] Lantz v. Tumlin, 74 W. Va. 196, 81 S. E. 820.

[47] Rassaert v. Mensch, 17 Cal. App. 637, 120 Pac. 1072.

[48] Whitcomb v. Whitcomb, 85 Vt. 76, 81 Atl. 97.

[49] Griggs v. Clark, 23 Cal. 427; Smith v. Knight, 77 Iowa 540, 42 N. W. 438; Maude v. Rodes, 4 Dana (Ky.) 144; Grove v. Fresh, 9 Gill & J. (Md.) 280; Clink v. Carpenter, 122 Mich. 681, 81 N. W. 932; Raymond v. Came, 45 N. H. 201; Childers v. Neely, 47 W. Va. 70, 34 S. E. 828, 49 L. R. A. 468, 81 Am. St. 777; Ex parte Marlin, 2 Bro. Ch. 15, 29 Eng. Reprint 8.

[50] Lenahan v. Casey, 46 Mont. 367, 128 Pac. 601.

[51] Starr v. Case, 59 Iowa 491, 13 N. W. 645; Levi v. Karrick, 8 Iowa 150; Lord v. Anderson, 16 Kans. 185; Leserman v. Bernheimer, 113 N. Y. 39, 20 N. E. 869; Rhiner v. Sweet, 2 Lans. (N. Y.) 386.

[52] Groth v. Kersting, 23 Colo. 213, 47 Pac. 393 (affg. 4 Colo. App. 395, 36 Pac. 156); Colehour v. Coolbaugh, 81 Ill. 29.

[53] Lord v. Anderson, 16 Kans. 185; Berkey v. Judd, 12 Minn. 52 (Gil. 23); Bloomfield v. Buchanan, 14 Ore. 181, 12 Pac. 238.

[53a] Rassaert v. Mensch, 17 Cal. App. 637, 120 Pac. 1072.

[54] Williams v. Williams, 104 Cal. 85, 37 Pac. 784; Albery v. Geis, 1 Cal. App. 381, 82 Pac. 262; Griffith v. Kirley, 189 Mass. 522, 76 N. E. 201; Arnold v. Angell, 62 N. Y. 508; Clark v. Gallaher, 3 Tex. Civ. App. 541, 22 S. W. 1047.

[55] Johnson v. Miller, 50 Ill. App. 60; Turner v. Turner, 9 Ky. L. 456, 5 S. W. 457; Dunlap v. Byers, 110 Mich. 109, 67 N. W. 1067; Clark v.

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ambiguous will be so construed as to uphold it, if possible.[56] A decree settling the principles by which the amount of loss chargeable against one partner was to be ascertained and providing for a future decree to be rendered when the amount was ascertained is not erroneous as being indefinite in amount.[57] Under some circumstances, usually where some partners have been guilty of misconduct, a personal judgment against certain partners in favor of other partners may be rendered in a suit for accounting requiring them to assume debts or pay over a sum of money.[58] The partners may be held individually liable for firm debts after the exhaustion of firm assets.[59] In some cases a decree may be entered without first settling partnership affairs, as where the defendant partner filed a bond to secure the payment of any amount which might be found due to the complaining partner, retained the assets, and made no offer to show there was no such settlement.[60] The interest of a deceased partner ascertained in equity may be paid to his administrator leaving the rights of those claiming a lien on it to be determined in a probate court.[61] Although the general rule is that a dissolution of a partnership will be adjudged as of the date of the judgment, if the equities warrant it may be adjudged as of a date earlier than the judgment, as in a case where dissolution was sought because of the plaintiff partner's physical incapacity, and because of the slow progress of the case through the courts,

Hall, 54 Nebr. 479, 74 N. W. 856; Bushby v. Berkeley, 135 App. Div. 443, 119 N. Y. S. 739. See LaCotts v. Pike, 91 Ark. 26, 120 S. W. 144, 134 Am. St. 48; Reilly v. Freeman, 109 App. Div. 4, 95 N. Y. S. 1069 (affd. in 184 N. Y. 610, 77 N. E. 1196); Cox v. Clarke, 45 Misc. 102, 91 N. Y. S. 587; Yarwood v. Billings, 31 Wash. 542, 72 Pac. 104; Turquand v. Wilson, 1 Ch. D. 85, 45 L. J. Ch. 104.

[56] Noble v. Faull, 26 Colo. 467, 58 Pac. 681; Knowlton v. Dolan, 151 Ind. 79, 51 N. E. 97; Hayes v. Reese, 34 Barb. (N. Y.) 151; Goldman v. Marcus, 4 Wills. Civ. Cas. Ct. App. (Tex.), § 208, 15 S. W. 412. See Rawlings v. Fish, 151 Ky. 764, 152 S. W. 941.

[57] Gore v. Vines, 72 W. Va. 783, 79 S. E. 820.

[58] Thomas v. Hollingsworth, 181 Ind. 411, 103 N. E. 840; Oustad v. Hahn, 27 N. Dak. 334, 146 N. W. 557.

[59] Rassaert v. Mensch, 17 Cal. App. 637, 120 Pac. 1072.

[60] Shadburne v. Sbarbaro, 182 Ill. App. 54.

[61] Pierson v. Garrison, 83 N. J. Eq. 334, 91 Atl. 829.

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the term of the partnership had practically expired before the final judgment.[62]

§ 732. **Costs.**—The general rule is that the costs of a partnership accounting are paid out of firm assets,[63] and this includes fees for attorneys or expert accountants,[64] and the partners must bear them in proportion to their shares in the partnership, if its assets are insufficient.[65] But, in the court's discretion,[66] costs

[62] Barclay v. Barrie, 209 N. Y. 40, 102 N. E. 602, 47 L. R. A. (N. S.) 839 (revg. 154 App. Div. 925, 139 N. Y. S. 81).

[63] Swafford v. White, 28 Ky. L. 119, 89 S. W. 129; Dyer v. Ballinger, 24 Ky. L. 1918, 72 S. W. 738; Broeg v. Pool, 22 Ky. L. 1354, 60 S. W. 518; Lyford v. Haines, 21 Ky. L. 948, 53 S. W. 646; McBurnie v. Semple, 14 Ky. L. 30, 19 S. W. 183; Baxter v. Hewes, 45 La. Ann. 1065, 13 So. 864; Burke v. Fuller, 41 La. Ann. 740, 6 So. 557; Philpot v. Patterson, 5 Mart. (N. S.) (La.) 273; Whitney v. Cook, 5 Mass. 139; Patrick v. Patrick, 71 N. J. Eq. 347, 63 Atl. 848; Masters v. Brooks, 132 App. Div. 874, 117 N. Y. S. 585; Hopfensack v. Hopfensack, 9 Daly (N. Y.) 457, 61 How. Prac. 498; Crotty v. Jarvis, 1 Misc. 316, 20 N. Y. S. 728, 48 N. Y. St. 781 (affg. 17 N. Y. S. 949); Fleming v. Carson, 37 Ore. 252, 62 Pac. 374; Gordon v. Moore, 134 Pa. St. 486, 19 Atl. 753; In re Gyger's Appeal, 62 Pa. St. 73, 1 Am. Rep. 382; Potter v. Jackson, 13 Ch. D. 845, 49 L. J. Ch. 232; Austin v. Jackson, 11 Ch. Div. 942; Bonville v. Bonville, 35 Beav. 129, 55 Eng. Reprint 844; Jones v. Welch, 1 Jur. (N. S.) 994; Rosher v. Crannis, 63 L. T. (N. S.) 272; Rowlands v. Evans, 14 Wkly. Rep. 882; Timothy v. Hindley, 14 Wkly. Rep 382; Curran v. Carey, 4 Manitoba 450; Chapman v. Newell, 14 Ont. Pr. 208; Blaney v. McGrath, 9 Ont. Pr. 417; Evans v. Honsinger, 11 Ont. W. R. 861; Hall v. Antrobus, 44 Nova Scotia 96. See Mitchell v. Lister, 21 Ont. 318.

[64] Faulkner v. Hendy, 79 Cal. 265, 21 Pac. 754; Chandler v. Sherman, 16 Fla. 99; Payne v. McNamara, 6 Ohio Cir. Dec. 62, 9 Ohio Cir. Ct. 132. See Patrick v. Patrick, 71 N. J. Eq. 347, 63 Atl. 848; Cronk v. Crandall, 137 App. Div. 440, 121 N. Y. S. 805.

[65] Isenhart v. Hazen, 10 Kans. App. 577, 63 Pac. 451; Pratt v. McHatton, 11 La. Ann. 260; Campbell v. Coquard, 16 Mo. App. 552; In re Beck, 19 Ore. 503, 24 Pac. 1038; In re Gyger's Appeal, 62 Pa. St. 73, 1 Am. Rep. 382; Gordon v. Moore, 8 Pa. Co. Ct. 289; Baker v. Milde (Tex. Civ. App. 1895), 33 S. W. 152; Newton v. Taylor, L. R. 19 Eq. 14, 23 Wkly. Rep. 330; Curran v. Carey, 4 Manitoba 450; Chapman v. Newell, 14 Ont. Pr. 208; Blaney v. McGrath, 9 Ont. Pr. 417.

[66] Granville v. Arnott, 77 Conn. 716, 59 Atl. 405; McBurnie v. Semple, 14 Ky. L. 30, 19 S. W. 183; Struthers v. Christal, 3 Daly (N. Y.) 327; Smith v. Green, 8 N. Y. Civ. Proc. 163; Smith v. Underhill, 64 Hun 639, 19 N. Y. S. 249, 47 N. Y. St. 23; Wehrman v. McFarland, 10 Ohio Super. Ct. Com. Pl. 320, 8 Ohio

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may be awarded against one partner, where justice or his misconduct demands it,[67] or where the claims of former partners are involved they may be apportioned between the parties to the suit.[67a] A partner who has overdrawn his share may be required to repay it, before costs are charged.[68] It was said in one case:[68a] "In equity costs do not always follow a decree against a party. They rest on the sound discretion of the court, and are to be awarded or refused, according to the justice of each particular case.[69] It has been decided that wherever an account is intricate or doubtful, there should be no costs,[70] and this is especially applicable to partnership accounts.[71] In such cases the costs are usually divided, or what is practically the same thing, are taxed on the partnership effects.[72] There were conflicting claims in this case

N. P. 673; Markle v. Wilbur, 200 Pa. 473, 50 Atl. 209; Gordon v. Moore, 8 Pa. Co. Ct. 289; Kennedy v. Hill, 89 S. Car. 462, 71 S. E. 974; Boothe v. Nim Co., 72 Wash. 679, 683, 131 Pac. 252; Smith v. Harris, 88 Kans. 226, 128 Pac. 378. See also Starr v. Case, 59 Iowa 491, 13 N. W. 645; Hart v. Hart, 117 Wis. 639, 94 N. W. 890; Ritter v. Ritter, 100 Wis. 468, 76 N. W. 347; Wright v. Hunter, 5 Ves. Jr. 792, 31 Eng. Reprint 861; Bingham v. Smith, 16 Grant Ch. (U. C.) 373; O'Lone v. O'Lone, 2 Grant Ch. (U. C.) 125. See Barker v. White, 42 N. Y. 617, 1 Abb. Dec. 95, 5 Abb. Prac. (N. S.) 124.

[67] Ginn v. Ewan, 93 Fed. 80, 35 C. C. A. 213; Taft v. Schwamb, 80 Ill. 289; Caldwell v. Lang, 101 S. W. 972, 31 Ky. L. 237; Borah v. O'Niell, 121 La. 733, 46 So. 788; Richard v. Mouton, 109 La. 465, 33 So. 563; Taylor v. Cawthorne, 17 N. Car. 221; Kennedy v. Hill, 89 S. Car. 462, 71 S. E. 974; Boothe v. Summit Coal Min. Co., 72 Wash. 679, 131 Pac. 252; Navarro v. Lamana (Tex. Civ. App.), 179 S. W. 922; Briere v. Taylor, 126 Wis. 347, 105 N. W. 817; Knapp v. Edwards, 57 Wis. 191, 15 N. W. 140; Hamer v. Giles, 11 Ch. Div. 942, 48 L. J. Ch. 508; Norton v. Russell, L. R. 19 Eq. 343, 23 Wkly. Rep. 252; Lodge v. Pritchard, 4 Giffard 295, 66 Eng. Reprint 717; Payne v. Felton, 4 L. J. Ch. (O. S.) 175; Carmichael v. Sharp, 1 Ont. 381; Woolans v. Vansickle, 17 Grant Ch. (U. C.) 451; Garven v. Allan, 3 Grant Ch. (U. C.) 238. Compare Stevens v. Yeatman, 19 Md. 480.

[67a] Smith v. Harris, 88 Kans. 226, 128 Pac. 278.

[68] Ross v. White [1894], 3 Ch. 326; Potter v. Jackson, 13 Ch. Div. 845; Rosher v. Crannis, 63 L. T. (N. S.) 272.

[68a] In re Gyger's Appeal, 62 Pa. St. 73.

[69] Citing 3 Daniell's Ch. Pr. 2.

[70] Citing Pitt v. Page, 1 Bro. P. C. 1.

[71] Citing Collyer on Partn. 339.

[72] Citing Hutcheson v. Smith, 5 Irish Eq. 117; Jones v. Morehead, 3 B. Mon. (Ky.) 385; Taylor v. Cawthorne, 2 Dev. Eq. (N. Car.) 221.

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on both sides, and each party has been found as to some of them to be in the wrong. There were questions of real doubt and difficulty as to the amount of rent, and the apportionment of expenses, as well as to interest and compensation. It is not easy to see how they could have been settled without a suit or a reference to mutual friends. We can not give so much weight as the master has done to the general denial by defendant in his answer of liability to account. It was not that which rendered the suit unavoidable. The costs of this litigation appear, therefore, to be a necessary expense in consequence of the disputes between the parties in closing up the concerns of this copartnership. It is an item in the amount of profit and loss, which it would have been much better for all the partners to have saved by mutual concessions or otherwise, but which can not in equity be charged upon one of them exclusively.[73] We are of the opinion that all the costs in the court below as well as the costs of this appeal should be paid out of the partnership money in the hands of the defendant, and that he should be allowed a credit therefor in his account."

§ 733. Appeal—Conclusiveness of judgment.—A judgment will not be reversed on appeal for matters based on a finding of fact from conflicting evidence, if there is sufficient evidence, without regard to that in conflict with it, which supports the findings and judgment.[74] Nor will a judgment be reversed

[73] Citing Caldwell v. Leiber, 7 Paige (N. Y. Ch.) 508.

[74] Reynolds v. Locke, 218 Fed. 442; Gunn v. Black, 60 Fed. 151, 8 C. C. A. 534; Reynolds v. Jackson, 25 Cal. App. 490, 144 Pac. 305; Yetzer v. Applegate, 83 Iowa 726, 50 N. W. 66; Newberry v. Rhinehart, 159 Ky. 513, 167 S. W. 674; Rawlings v. Fish, 151 Ky. 764, 152 S. W. 941; Harris v. Dotson, 149 Ky. 695, 149 S. W. 1008; Bannon v. Hawkins, 35 S. W. 636, 18 Ky. L. 150; May v. Cahn, 34 Nebr. 652, 52 N. W. 288; Stepper v. Bruenn, 28 N. Dak. 1, 147 N. W. 724; Tillotson v. Paquet, 74 Ore. 539, 145 Pac. 268; Gloninger v. Barclay, 246 Pa. St. 265, 92 Atl. 191; Fidelity Title &c. Co. v. Bell, 188 Pa. St. 637, 41 Atl. 637; In re Burrough's Appeal, 26 Pa. St. 264; Mays v. Melat, 29 Pa. Super. Ct. 365; Rush v. First Nat. Bank (Tex. Civ. App.), 160 S. W. 319; Pederson v. Parke, 68 Wash. 482, 123 Pac. 777; Torbe v. Strauss, 155 Wis. 518, 144 N. W. 184, 1136.

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on a finding made at the appellant's request,[75] or where substantial justice was done.[76] It may be reversed because contrary to the rules of law applicable to the case,[77] or where there is a mistake in computation,[78] or there is insufficient evidence to support it.[79] Thus, on an appeal by plaintiff in a suit for the dissolution of a partnership from a decree which was based on a finding that a general partnership did not exist, the decree was affirmed, although the court was in doubt as to whether the evidence showed that plaintiff had been fairly treated by defendant, since the court was not satisfied that the plaintiff had discharged the burden upon him of showing that a general partnership existed.[80] The court will regulate the right of a partner to share earnings accruing to the firm pending appeal from a decree of dissolution.[81] A judgment in an action for an accounting between partners is conclusive upon the parties as to all matters adjudicated therein until set aside.[82] It is of no effect as to matters not before the court when the settlement was had.[83] It may be opened or set aside upon the grounds for which any judgment in equity

[75] Schermerhorn v. Brewer, 63 Hun 626, 17 N. Y. S. 701, 44 N. Y. St. 135; Yarwood v. Billings, 31 Wash. 542, 72 Pac. 104. See Snyder v. O'Beirne, 132 Mich. 340, 93 N. W. 872.

[76] Smith v. Lancaster, 37 App. (D. C.) 25; Eames v. Miller, 108 Mich. 406, 66 N. W. 338; McCullough v. DeWitt, 163 Mo. 306, 63 S. W. 694; Jones v. Webb, 8 S. Car. 202; Green v. Stacy, 90 Wis. 46, 62 N. W. 627; Tolford v. Tolford, 44 Wis. 547.

[77] Savage v. Carter, 9 Dana (Ky.) 408; Ferrell v. Bales, 23 Ky. L. 1516, 65 S. W. 604; Lafferty v. Lafferty, 174 Pa. St. 536, 34 Atl. 203, 205; Botham v. Keefer, 2 Ont. App. 595.

[78] White v. Bullock, 18 Mo. 16; Chaves v. Linan, 2 P. I. 12.

[79] Richard v. Mouton, 106 La. 435, 30 So. 894. See Aldecoa v. Warner, 16 P. I. 423.

[80] Smith v. Lancaster, 37 App. (D. C.) 25.

[81] Ruggles v. Buckley, 192 Fed. 907, 113 C. C. A. 299.

[82] Broda v. Greenwald, 66 Ala. 538; Williams v. Lane, 158 Cal. 39, 109 Pac. 873; Maginnis v. Crosby, 11 La. Ann. 400; Tiemann v. Molliter, 71 Mo. 512; Hayes v. Reese, 34 Barb. (N. Y.) 151; Cockley v. Brucker, 54 Ohio St. 214, 44 N. E. 590.

[83] Schnell v. Schnell, 39 Ind. App. 556, 80 N. E. 432.

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will be opened.[84] Upon opening the judgment, the account should ordinarily be restated entirely.[85]

[84] Powers v. Dickie, 49 Ala. 81; Green v. Thornton, 96 Cal. 67, 30 Pac. 965; Robertson v. Gibb, 38 Mich. 165; Vechsler v. Blitzer, 165 App. Div. 967, 150 N. Y. S. 770.

[85] Black v. Merrill, 65 Cal. 90, 3 Pac. 113; Hunt v. Stuart, 53 Md. 225; Pritt v. Clay, 6 Beav. 503, 49 Eng. Reprint 920.

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CHAPTER XXIV

ACTIONS BETWEEN PARTNERS

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§ 740. **In general.**—Partnership brings many strange relations to those adopting its use for the transaction of their business ventures, but in no manner are these strange relations more forcibly shown than in suits inter sese. In one sense, the firm is an entity, separate and apart from the members which compose it. In another sense, it is simply the sum total of all the members, with no separate and distinct identity. Every partner, therefore, being a distinct part thereof, must sue himself if he should sue the firm or be sued by the firm, and the law has ever discountenanced a person suing himself. Consequently, many peculiar rules and remedies have arisen in partnership suits inter sese, which will be discussed in this chapter, both from a legal and an equitable viewpoint.

§ 741. **Actions between firm and partner.**—There can be no action at law by a partner against the firm or the firm against the partner. There are various reasons why this can not be. Suits can not be brought by a partnership in the firm name unless there is a statute authorizing such procedure. The partners, therefore, in most jurisdictions must sue and be sued as individuals and all of them must be joined in an action against the firm. So if one partner could sue the firm, he must be both plaintiff and defendant and the law does not permit him to be a party on both sides of an action. He might be put in the position of recovering a judgment against himself, which he might be compelled himself to satisfy.[1] Another reason why a partner can not sue the firm at law is that there can in fact be no debt due from the partner to the firm, or from the firm to

[1] Story Partnership, 221; Bates Partnership, § 849; T. Parsons Partnership, §§ 184, 185. See also Pico v. Cuyas, 47 Cal. 174; Mickle v. Peet, 43 Conn. 65; Bracken v. Kennedy, 3 Scam. (Ill.) 558; O'Brien v. Smith, 42 Kans. 49, 21 Pac. 784; Remington v. Allen, 109 Mass. 47; Duff v. Maguire, 99 Mass. 300; Burley v. Harris, 8 N. H. 233, 29 Am. Dec. 650; Newby v. Harrell, 99 N. Car. 149, 5 S. E. 287, 6 Am. St. 503.

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one partner, until accounts have been settled, which is usually upon dissolution. Such is the nature of the partnership relation that prior to that time advances by one partner to the firm or from the firm to one partner are not debts, merely items in the account.[2] Judge Story says:[3] "The ground why at law, independent of any special covenant, or any distinct several contract, one partner can not maintain a suit against the other partners, for moneys paid, or advanced, or contributed, or liabilities incurred, on account of the partnership (or for neglect of the partnership business), may be readily explained in a satisfactory manner. In the first place, upon the more technical principles of the common law, one partner can not sue the others for a contribution or payment made for a just partnership liability; for in such a suit all the partners, including himself, must be made defendants; and it is clear, upon the acknowledged principles of pleading at the common law, that a party can not at once be a plaintiff and a defendant in the same suit; or in other words, he can not sue himself, either alone, or in conjunction with others. But a reason, far more satisfactory, because it is in no shape founded upon technical principles, is, that until all the partnership concerns are ascertained and adjusted, it is impossible to know whether a particular partner be a debtor or a creditor of the firm; for although he may have advanced large sums of money on account thereof, he may be indebted to the firm in a much larger amount. Now, a settlement of all the partnership concerns is ordinarily, during the

[2] Tipton v. Nance, 4 Ala. 194; Cole v. Fowler, 68 Conn. 450, 36 Atl. 807; Stoddard v. Wood, 9 Gray (Mass.) 90; Towle v. Meserve, 38 N. H. 9; Gibson v. Moore, 6 N. H. 547; Ives v. Miller, 19 Barb. (N. Y.) 196; Oglesby v. Thompson, 59 Ohio St. 60, 51 N. E. 878; Richardson v. Bank of England, 4 Myl. & C. 165, 8 L. J. Ch. 1, 2 Jur. 911. See also Merritt v. Smith, 158 Ala. 186, 48 So. 495; Burns v. Nottingham, 60 Ill. 531; Mattingly v. Stone, 35 S. W. 921, 18 Ky. L. 187; Ryder v. Wilcox, 103 Mass. 24; Miner v. Lorman, 56 Mich. 212, 22 N. W. 265; Crosby v. Timolat, 50 Minn. 171, 52 N. W. 526; Halsted v. Schmelzel, 17 Johns. (N. Y.) 80; Casey v. Brush, 2 Caines (N. Y.) 293; Newby v. Harrell, 99 N. Car. 149, 5 S. E. 284, 6 Am. St. 503; Ferguson v. Wright, 61 Pa. St. 258; Sadler v. Nixon, 5 B. & Ad. 936.

[3] Story Partnership (5 ed.), § 221.

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continuance of the partnership, unattainable at law; and even in equity it is not ordinarily enforced except upon a dissolution of the partnership. If one partner could recover against the other partners the whole amount paid by him on account of the partnership, they would immediately have a cross action against him for the whole amount, or his share thereof; and if he could recover only their shares thereof, then, in order to ascertain those shares, a full account of all the partnership concerns must be taken, and the partnership itself wound up. This would manifestly be a most serious inconvenience, as well as a change of the original contract, from a joint contract of all the partners, in solido, to a several contract, each for his own aliquot part of the final balance, due to a particular partner upon a special transaction. And in cases of this sort the maxim may justly apply: Frustra petis, quod statim alteri reddere cogeris: or, as it is sometimes expressed, Frustra peterit, quod mox rediturus esset." So one partner can not sue the firm at law and recover for services performed for the firm;[4] or for advances or loans to the firm;[5] or for contribution for money paid for the firm's use or in satisfaction of a firm debt;[6] or for

[4] O'Brien v. Smith, 42 Kans. 49, 21 Pac. 784; Wright v. Troop, 70 Maine 346; Nickerson v. Spindell, 164 Mass. 25, 41 N. E. 105; Wood v. Cullen, 13 Minn. 394 (Gill 365); Drewer v. Ferson, 22 Wis. 651.

[5] Johnson v. Peck, 58 Ark. 580, 25 S. W. 865; Cole v. Fowler, 68 Conn. 450, 36 Atl. 807; Mickle v. Peet, 43 Conn. 65; Price v. Drew, 18 Fla. 670; Elliott v. Deason, 64 Ga. 63; Bracken v. Kennedy, 4 Ill. 558; Reddick v. White, 46 La. Ann. 1198, 15 So. 487; Starbuck v. Shaw, 10 Gray (Mass.) 492; Gridley v. Dole, 4 N. Y. 486; Weidig v. Moore, 24 Cin. Wkly. Law Bul. 376; Leidy v. Messinger, 71 Pa. St. 177; Merriwether v. Hardeman, 51 Tex. 436; Gauger v. Pautz, 45 Wis. 449; Lower v. Denton, 9 Wis. 268; Richardson v. Bank of England, 4 Myl. & C. 165, 8 L. J. Ch. 1, 2 Jur. 911.

[6] Philips v. Lockhart, 1 Ala. 521; De Jarnette v. McQueen, 31 Ala. 230, 68 Am. Dec. 164; Johnson v. Peck, 58 Ark. 580, 25 S. W. 865; Price v. Drew, 18 Fla. 670; Crossley v. Taylor, 83 Ind. 337; Coleman v. Coleman, 78 Ind. 344; Lawrence v. Clark, 9 Dana (Ky.) 257, 35 Am. Dec. 133; Warring v. Arthur, 98 Ky. 34, 32 S. W. 221, 17 Ky. L. 605; Ward v. Best, 8 Ky. L. 784; O'Brien v. Drexilius, 7 Ky. L. 527; Shattuck v. Lawson, 10 Gray (Mass.) 405; White v. Harlow, 5 Gray (Mass.) 463; Haskell v. Adams, 7 Pick. (Mass.) 59; Morin v. Martin, 25 Mo. 360; Halsted v. Schmelzel, 17 Johns. (N. Y.) 80; Mc-

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goods sold to the firm;[7] or for rent for property used by the firm;[8] or for a share in the profits.[9] A partner can not recover on a firm note executed to him.[10] But it has often been held that if a partner takes a note of the firm for an advance to it by him, and indorses it to a holder for value, the latter may recover from the firm.[11] The same difficulty as to making a party both plaintiff and defendant applies to an action by a firm against a partner on an advance to him, and it is also true that until an accounting is had, his share in the firm assets is not known, nor whether there will in fact be a duty on him to con-

Donald v. Holmes, 22 Ore. 212, 29 Pac. 735; Leidy v. Messinger, 71 Pa. St. 177; Lockhart v. Lytle, 47 Tex. 452; Spear v. Newell, 13 Vt. 288. But see Wheeler v. Arnold, 30 Mich. 304, and compare Clark v. Mills, 36 Kans. 393, 13 Pac. 569. See also Philips v. Lockhart, 1 Ala. 521; Warring v. Arthur, 98 Ky. 34, 32 S. W. 221, 17 Ky. L. 605; Starbuck v. Shaw, 10 Gray (Mass.) 492; Cockrell v. Thompson, 85 Mo. 510; Harris v. Harris, 39 N. H. 45; Murray v. Herrick, 171 Pa. St. 21, 32 Atl. 1125; Blakely v. Smock, 96 Wis. 611, 71 N. W. 1052.

[7] Myrick v. Daine, 9 Cush. (Mass.) 248. Contra: Krall v. Forney, 182 Pa. St. 6, 37 La. Ann. 846.

[8] Pico v. Cuyas, 47 Cal. 180; Johnson v. Wilson, 54 Ill. 419; Hemenway v. Burnham, 90 Mich. 227, 51 N. W. 276; Estes v. Whipple, 12 Vt. 373.

[9] Burhans v. Jefferson, 76 Fed. 25, 40 U. S. App. 302, 22 C. C. A. 25; Fisher v. Sweet, 67 Cal. 228, 7 Pac. 657; Russell v. Ford, 2 Cal. 86; Lang v. Oppenheim, 96 Ind. 47; Meredith v. Ewing, 85 Ind. 410; Maguire v. Pingree, 30 Maine 508; Gomersall v. Gomersall, 14 Allen (Mass.) 60; Stone v. Aldrich, 43 N. H. 52; Harris v. Harris, 39 N. H. 45; Attwater v. Fowler, 1 Hall (N. Y.) 180; Devore v. Woodruff, 1 N. Dak. 143, 45 N. W. 701; Masters v. Freeman, 17 Ohio St. 323; Patton v. Ash, 7 Serg. & R. (Pa.) 116; M'Fadden v. Hunt, 5 Watts & S. (Pa.) 468; Ozeas v. Johnson, 4 Dall. (Pa.) 434, 1 L. ed. 897, 1 Binn. (Pa.) 191; Kutz v. Dreibelbis, 126 Pa. St. 335; Rice v. Angell, 73 Tex. 350, 11 S. W. 338, 3 L. R. A. 769; Kruschke v. Stefan, 83 Wis. 373, 53 N. W. 679. But see Stanberry v. Cattell, 55 Iowa 617, 8 N. W. 478, and compare Ferguson v. Baker, 116 N. Y. 257, 22 N. E. 400; Whetstone v. Shaw, 70 Mo. 575.

[10] Thompson v. Lowe, 111 Ind. 272, 12 N. E. 476; Cutting v. Daigneau, 151 Mass. 297, 23 N. E. 839; Hall v. Logan, 34 Pa. St. 331; Woods v. Ridley, 11 Humph. (Tenn.) 194. Contra: Morrison v. Stockwell, 9 Dana (Ky.) 172.

[11] Carpenter v. Greenup, 74 Mich. 664, 42 N. W. 276, 4 L. R. A. 241, 16 Am. St. 666; Walker v. Wait, 50 Vt. 668. Compare Wintermute v. Tarrant, 83 Mich. 555, 47 N. W. 358; Davis v. Merrill, 51 Mich. 480, 16 N. W. 864. See cases cited in preceding note.

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tribute the amount of the advance,[12] so there is no right to recover on a note given by a partner to the firm,[13] nor on an assignment of his note to the firm;[14] nor on his indorsement of a note.[15] But it seems the firm may assign the note of a partner to a third party, who will have the right to bring an action on it.[16] Nor can the trustee in liquidation of a dissolved firm sue one of the partners in an action at law upon a note which represented an advance by the firm to the partner.[17]

§ 742. Actions between firms having common partner.—The rule is that one firm can not maintain an action at law on an obligation to it from another firm having a common partner, but relief must be had in equity. The same difficulties as to parties and accounting arise as in suits between firms and partners.[18] The bar to an action at law between two firms because of the

[12] Kwapil v. Bell Tower Co., 55 Wash. 583, 104 Pac. 824.

[13] Tipton v. Nance, 4 Ala. 194; Miller v. Andres, 13 Ga. 366; Hall v. Kimball, 77 Ill. 161; Haven v .Wakefield, 39 Ill. 509; Parker v. Macomber, 18 Pick. (Mass.) 505; Ivy v. Walker, 58 Miss. 253; Burley v. Harris, 8 N. H. 233, 29 Am. Dec. 650; Summerson v. Donovan, 110 Va. 657, 66 S. E. 822, 19 Ann. Cas. 253. Compare Jemison v. Walsh, 30 Ind. 167.

[14] Hall v. Kimball, 77 Ill. 161.

[15] Tindal v. Bright, Minor (Ala.) 103; Tipton v. Nance, 4 Ala. 194.

[16] Bank of British North America v. Delafield, 126 N. Y. 410, 27 N. E. 797; Comer v. Thompson, 4 U. C. Q. B. (O. S.) 256.

[17] Summerson v. Donovan, 110 Va. 657, 66 S. E. 822, 19 Ann. Cas. 253.

[18] Alexander v. Jones, 90 Ala. 474, 7 So. 903; Alexander v. King, 87 Ala. 642, 6 So. 382; Hall v. Kimball, 77 Ill. 161; Haven v. Wakefield, 39 Ill. 509; Schnebly v. Culter, 22 Ill. App. 87; Herriott v. Kersey, 69 Iowa 111, 28 N. W. 468; Frye v. Sanders, 21 Kans. 26; Denny v. Metcalf, 28 Maine 389; Portland Bank v. Hyde, 11 Maine 196; Grahame v. Harris, 5 Gill & J. (Md.) 489; Crosby v. Timolat, 50 Minn. 171, 52 N. W. 526; Morris v. Hillery, 7 How. (Miss.) 61; Calvit v. Markham, 3 How. (Miss.) 343; Chapman v. Evans, 44 Miss. 113; Willis v. Barron, 143 Mo. 450, 45 S. W. 289, 65 Am. St. 673; Cole v. Reynolds, 18 N. Y. 75; Englis v. Furniss, 4 E. D. Smith (N. Y.) 587; Rogers v. Rogers, 5 Ired. Eq. (N. Car.) 31; Beacannon v. Liebe, 11 Ore. 443, 5 Pac. 273; M'Fadden v. Hunt, 5 Watts & S. (Pa.) 468; Hall v. Logan, 34 Pa. St. 331; Miller v. Knauff, 2 Clark (Pa.) 11, 3 Pa. L. J. 225; Price v. Spencer, 7 Phila. (Pa.) 179; Allen v. Erie City Bank, 57 Pa. St. 129; Tassey v. Church, 6 Watts & S. (Pa.) 465, 40 Am. Dec. 575; Pennock v. Swayne, 6 Watts & S. (Pa.) 239; Banks v. Mitchell, 8 Yerg. (Tenn.) 111, 29 Am. Dec. 104; Jungk v. Reed, 9 Utah 49,

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common partner, is, it is held, removed by his death.[19] The authorities all hold, however, that there is a remedy in equity on liabilities between firms having a common partner.[20] There are also difficulties in the way of equitable settlement of claims between firms having common partners. The weight of authority holds that in equity one firm may sue the other on an obligation, and usually the mutual partner is treated only as a debtor, not as a creditor, and the members of the creditor firm are left to settle their own equities.[21] This position is strengthened by the fact that under the codes, the difficulty as to a partner being both plaintiff and defendant is obviated.[22] It was said in a leading case:[23] "By the code the distinction between actions at law

33 Pac. 236; Green v. Chapman, 27 Vt. 236; Bosanquet v. Wray, 6 Taunt. 597, 1 E. C. L. 597, 2 Marsh. 319.

[19] Lacy v. LeBruce, 6 Ala. 904; Wilby v. Phinney, 15 Mass. 116; Denny v. Metcalf, 28 Maine 389.

[20] Haven v. Wakefield, 39 Ill. 509; Schnebly v. Culter, 22 Ill. App. 87; Herriott v. Kersey, 69 Iowa 111, 28 N. W. 468; Portland Bank v. Hyde, 11 Maine 196; Crosby v. Timolat, 50 Minn. 171, 52 N. W. 526; Calvit v. Markham, 3 How. (Miss.) 343; Chapman v. Evans, 44 Miss. 113; Schnaier v. Schmidt, 59 Hun 625, 13 N. Y. S. 725 (affd. 128 N. Y. 683); Englis v. Furniss, 4 E. D. Smith (N. Y.) 587, 2 Abb. Pr. 333; Cole v. Reynolds, 18 N. Y. 75; Rogers v. Rogers, 5 Ired. Eq. (N. Car.) 31; Riddle v. McBeth, 4 West. L. M. (Ohio) 153, 2 Ohio Dec. (Reprint) 606; Banks v. Mitchell, 8 Yerg. (Tenn.) 111, 29 Am. Dec. 104; Bosanquet v. Wray, 6 Taunt. 597, 1 E. C. L. 597, 2 Marsh. 319.

[21] Cole v. Reynolds, 18 N. Y. 74, is the leading case holding this view. See also Schnebly v. Culter, 22 Ill. App. 87; Haven v. Wakefield, 39 Ill. 509; Duff v. Maguire, 107 Mass. 87; Crosby v. Timolat, 50 Minn. 171, 52 N. W. 526; Chapman v. Evans, 44 Miss. 113; Mangels v. Shaen, 21 App. Div. 507, 48 N. Y. S. 526; First Nat. Bank of Champlain v. Wood, 128 N. Y. 39, 27 N. E. 1020; Beacannon v. Liebe, 11 Ore. 443, 5 Pac. 273; Price v. Spencer, 7 Phila. (Pa.) 179; Tassey v. Church, 6 Watts & S. (Pa.) 465, 40 Am. Dec. 575; Bryant v. Wardell, 2 Exch. 479; Bates Partnership, § 905; 1 Story Eq. Jur., § 679.

[22] First Nat. Bank of Champlain v. Wood, 128 N. Y. 39, 27 N. E. 1020; Payne v. Freer, 91 N. Y. 43, 43 Am. Rep. 640; Cole v. Reynolds, 18 N. Y. 74; Mangels v. Shaen, 21 App. Div. 507, 48 N. Y. S. 526; Schnaier v. Schmidt, 13 N. Y. S. 725 (affd. without opinion 128 N. Y. 683); Kingsland v. Braisted, 2 Lans. (N. Y.) 17; Englis v. Furniss, 4 E. D. Smith (N. Y.) 587; Gibson v. Ohio Farina Co., 4 Wkly. L. Gaz. (Ohio) 81, 3 Ohio Dec. (Reprint) 151, 2 Disney (Ohio) 499; Beacannon v. Liebe, 11 Ore. 443, 5 Pac. 273. See also Frye v. Sanders, 21 Kans. 26.

[23] Cole v. Reynolds, 18 N. Y. 74.

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and suits in equity is abolished. The course of proceeding in both classes of cases is not the same, whether the action depends upon legal principles or equitable, it is still a civil action, to be commenced and prosecuted without reference to this distinction. But, while this is so in reference to the form and course of proceeding in the action, the principles, by which the rights of the parties are to be determined, remain unchanged. The code has given no new cause of action. In some cases parties are allowed to maintain an action who could not have maintained it before, but in no case can such an action be maintained where no action at all could have been maintained before upon the same state of facts. If under the former system a given state of facts would have entitled a party to a decree in equity in his favor, the same state of facts now, in an action prosecuted in the manner prescribed by the code, will entitle him to a judgment to the same effect. If the facts are such as that, at the common law, the party would have been entitled to judgment, he will, by proceeding as the code requires, obtain the same judgment. The question, therefore, is whether, in the case now under consideration, the facts as they are assumed to be, would before the adoption of the code have sustained an action at law or a suit in equity. The defendants' firm are indebted to the plaintiffs' firm upon an account stated and settled between them. This fact, standing alone, would have entitled the plaintiffs to maintain an action at law. But there is another fact in the case, which upon a technical rule peculiar to the common law, would have defeated such an action. One of the individuals composing the plaintiffs' firm is also a member of the defendants' firm. A man can not sue himself; and as, at common law, all the members of a firm must unite in bringing an action, it follows that in such a case no action at law could be sustained. But in equity this technicality does not stand in the way of justice. It is enough that the proper parties are before the court. They may be plaintiffs or defendants, according to circumstances, but, being before the court, it will proceed to pronounce such judgment as the facts of the case require. This latter rule is obviously

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the dictate of common sense. * * * There is no difficulty, therefore, growing out of the fact that one of the parties is a member of both firms, in sustaining this action." Under the codes it is held that one firm may maintain an action against another having a common partner, for goods sold, since for such action an accounting is not necessary.[24] But the codes, though removing the technical objections as to parties, have not changed the difficulties as to accounting inherent in the nature of partnership relations, and the character of relief which can be given in a code action is the same as in equity, except where an accounting is not necessary. And at least one well-known text-writer,[25] and some cases,[26] hold that even in equity, the matter can not be treated as one between firms, but, the equities of each individual partner in each firm must be reached, and their rights adjusted in accordance if it requires dissolution of both firms, the reason being the difficulties of the situation in fixing the rights and liabilities of the common partner as a member of each firm.

§ 743. Actions at law between partners in general.—It has been almost uniformly held that no actions can be maintained, at law, between partners, as such, by reason of the partnership relation. There is no rule forbidding suits at law between partners individually, but prior to a settlement of the partnership business, one partner can not maintain an action at law against his copartner with reference to partnership affairs.[27] Mr. Mechem says: "The reason for this rule is that

[24] Schnaier v. Schmidt, 59 Hun 625, 13 N. Y. S. 725 (affd. 128 N. Y. 683, 29 N. E. 149); First Nat. Bank of Champlain v. Wood, 128 N. Y. 35, 27 N. E. 1020; Beacannon v. Liebe, 11 Ore. 443, 5 Pac. 273.

[25] Parsons Partnership, §§ 162, 163. See also 5 Am. L. Rev., p. 47.

[26] Page v. Thompson, 33 Ind. 137; Crosby v. Timolat, 50 Minn. 171, 52 N. W. 526; Payne v. Freer, 91 N. Y. 43, 43 Am. Rep. 640; Englis v. Furniss, 2 Abb. Pr. (N. Y.) 333, 4 E. D. Smith (N. Y.) 587; Rogers v. Rogers (5 Ired. Eq.), 40 N. Car. 31.

[27] Dukes v. Kellogg, 127 Cal. 563, 60 Pac. 44. See also Riddle v. Whitehill, 135 U. S. 621, 34 L. ed. 283, 10 Sup. Ct. 924; Burhans v. Jefferson, 76 Fed. 25, 22 C. C. A. 25, 40 U. S. App. 302; Bumpass v. Webb, 1 Stew. (Ala.) 19, 18 Am. Dec. 34; King v. Moore, 72 Ark. 469, 82 S. W. 494;

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it is ordinarily impossible to determine whether the defendant partner is indebted to the plaintiff partner or not until the partnership accounts are settled and the true standing of the parties ascertained; and the process and remedies afforded by a court of

Bailey v. Starke, 6 Ark. 191; Byrne v. Byrne, 94 Cal. 576, 29 Pac. 1115, 30 Pac. 196; Bean v. Gregg, 7 Colo. 499, 4 Pac. 903; Cole v. Fowler, 68 Conn. 450, 36 Atl. 807; Dewit v. Staniford, 1 Root (Conn.) 270; Robinson v. Green, 5 Harr. (Del.) 115; Price v. Drew, 18 Fla. 670; Miller v. Freeman, 111 Ga. 654, 36 S. E. 961, 51 L. R. A. 504; Miller v. Andres, 13 Ga. 366; Paulk v. Creech, 8 Ga. App. 738, 70 S. E. 145; Haskins v. Curran, 4 Idaho 573, 43 Pac. 559; Sindelare v. Walker, 137 Ill. 43, 27 N. E. 59, 31 Am. St. 353; Bowzer v. Stoughton, 119 Ill. 47, 9 N. E. 208; Hanks v. Baber, 53 Ill. 292; George v. Pfeil, 158 Ill. App. 261; Newman v. Tichenor, 88 Ill. App. 1; Douthitt v. Douthitt, 133 Ind. 26, 32 N. E. 715; Mahan v. Sherman, 7 Blackf. (Ind.) 378; Bond v. May, 38 Ind. App. 396, 78 N. E. 260; Mullany v. Keenan, 10 Iowa 224; O'Brien v. Smith, 42 Kans. 49, 21 Pac. 784; Truitt v. Baird, 12 Kans. 420; Coulson v. Ferree, 85 S. W. 686, 27 Ky. L. 451; Sebastian v. Booneville Academy Co., 56 S. W. 810, 22 Ky. L. 186; Stone v. Mattingly, 19 S. W. 402, 14 Ky. L. 113; Reddick v. White, 46 La. Ann. 1198, 15 So. 487; Perry v. Cobb, 88 Maine 435, 34 Atl. 278, 49 L. R. A. 389; Wright v. Troop, 70 Maine 346; Morgart v. Smouse, 103 Md. 463, 63 Atl. 1070, 115 Am. St. 367; Kennedy v. M'Fadon, 3 Har. & J. (Md.) 194, 5 Am. Dec. 434; Myrick v. Dame, 9 Cush. (Mass.) 248; Nickerson v. Spindell, 164 Mass. 25, 41 N. E. 105; Couilliard v. Eaton, 139 Mass. 105, 28 N. E. 579; Kalamazoo Trust Co. v. Merrill, 159 Mich. 649, 124 N. W. 597; Wilcox v. Comstock, 37 Minn. 65, 33 N. W. 42; Evans v. White (Miss.), 31 So. 833; Hoff v. Rogers, 67 Miss. 208, 7 So. 358, 19 Am. St. 301; Springer v. Cabell, 10 Mo. 640; Johnson v. Ewald, 82 Mo. App. 276; Croft v. Bain, 49 Mont. 484, 143 Pac. 960; Boehme v. Fitzgerald, 43 Mont. 226, 115 Pac. 413; Doll v. Hennessey Mercantile Co., 33 Mont. 80, 81 Pac. 325; Younglove v. Liebhardt, 13 Nebr. 557, 14 N. W. 526; Wicks v. Lippman, 13 Nev. 499; Blaisdell v. Ladd, 14 N. H. 129; Davis v. Minch, 80 N. J. L. 214, 76 Atl. 328; Gulick v. Gulick, 14 N. J. L. 578; Willey v. Renner, 8 N. Mex. 641, 45 Pac. 1132; Lasky v. Coverdale, 84 Misc. 34, 145 N. Y. S. 994; Vickery v. Stemm, 140 N. Y. S. 1007; Weiss v. Weiss, 75 Misc. 644, 133 N. Y. S. 1021; Mitchell v. Tonkin, 109 App. Div. 165, 95 N. Y. S. 669; Murray v. Bogert, 14 Johns. (N. Y.) 318, 7 Am. Dec. 466; Graham v. Holt, 3 Ired. L. (N. Car.) 300; Devore v. Woodruff, 1 N. Dak. 143, 45 N. W. 701; Kunneke v. Mapel, 60 Ohio St. 1, 53 N. E. 259; Oglesby v. Thompson, 59 Ohio St. 60, 51 N. E. 878; Cobb v. Martin, 32 Okla. 588, 123 Pac. 422; Wilson v. Wilson, 26 Ore. 251, 38 Pac. 185; Ozeas v. Johnson, 4 Dall. (Pa.) 434, 1 L. ed. 897, 1 Binn. (Pa.) 191; Dowling v. Clarke, 13 R. I. 134; Course v. Prince, 1 Mill. (S. Car.) 413, 12 Am. Dec. 649; Eddins v. Menefee (Tenn. Ch. App.), 54 S. W. 992; Southworth v. Thompson, 10 Heisk. (Tenn.) 10;

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law are not usually adequate or appropriate to the investigation of claims requiring such an accounting."[28] Even after dissolution there is no right to sue until there has been a settlement,[29] although it seems the parties after dissolution may consent to an action between them.[30] "This rule has but few exceptions; most of the so-called exceptions being apparent only, and not real. After the partnership is practically at an end, whether it be a single venture or otherwise, the rule can not apply, for the parties are no longer partners. So an action may be maintained

Lockhart v. Lytle, 47 Tex. 452; Danforth v. Levin (Tex. Civ. App.), 156 S. W. 569; Jungk v. Reed, 9 Utah 49, 33 Pac. 236; Beede v. Fraser, 66 Vt. 114, 28 Atl. 880, 44 Am. St. 824; Judd v. Wilson, 6 Vt. 185; Summerson v. Donovan, 110 Va. 657, 66 S. E. 822, 19 Ann. Cas. 253; Wright v. Michie, 6 Grat. (Va.) 354; Stevens v. Baker, 1 Wash. Ter. 315; Smith v. Putnam, 107 Wis. 155, 82 N. W. 1077, 83 N. W. 288; Lower v. Denton, 9 Wis. 268; Mitchell v. Gormley, 9 Ont. 139 (affd. 14 Ont. App. 55); Wood v. Woad, L. R. 9 Exch. 190; Milburn v. Codd, 7 B. & C. 419, 14 E. C. L. 419.

[28] Mechem Partnership, § 133. See cases cited in preceding section, notes 18, 24.

[29] Philips v. Lockhart, 1 Ala. 521; De Jarnette v. McQueen, 31 Ala. 230, 68 Am. Dec. 164; Calvert v. Marlow, 6 Ala. 337; Ross v. Cornell, 45 Cal. 133; Gleason v. White, 34 Cal. 258; Price v. Drew, 18 Fla. 670; Miller v. Andres, 13 Ga. 366; Crossley v. Taylor, 83 Ind. 337; Funk v. Ryan, 4 Ill. 322; Davenport v. Gear, 2 Ill. 495; Lang v. Oppenheim, 96 Ind. 47; Powell v. Bennett, 4 Ind. App. 112, 29 N. E. 926; O'Brien v. Smith, 42 Kans. 49, 21 Pac. 784; Riarl v. Wilhelm, 3 Gill (Md.) 356; Williams v. Henshaw, 12 Pick. (Mass.) 378, 23 Am. Dec. 614; Haskell v. Adams, 7 Pick. (Mass.) 59; Gardiner v. Fargo, 58 Mich. 72, 24 N. W. 655; Miner v. Lorman, 56 Mich. 212, 22 N. W. 265; White v. Waide, Walk. (Miss.) 263; Bond v. Bemis, 55 Mo. 524; Bender v. Markle, 37 Mo. App. 234; Ross v. Carson, 32 Mo. App. 148; Harris v. Harris, 39 N. H. 45; Belanger v. Dana, 52 Hun 39, 4 N. Y. S. 776, 22 N. Y. St. 218; Knight v. Hinton, 11 Cin. Wkly. Law Bul. 199, 9 Ohio Dec. (Reprint) 204; Neil v. Greenleaf, 26 Ohio St. 567; Masters v. Freeman, 17 Ohio St. 323; Kutz v. Dreibelbis, 126 Pa. St. 335, 24 W. N. C. (Pa.) 67; Leidy v. Messinger, 71 Pa. St. 177; Ferguson v. Wright, 61 Pa. St. 258, 7 Phila. (Pa.) 92; Ozeas v. Johnson, 4 Dall. (Pa.) 434, 1 L. ed. 897, 1 Binn. 191; Rice v. Angell, 73 Tex. 350, 11 S. W. 338, 3 L. R. A. 769. Compare Caswell v. Cooper, 18 Ill. 532; Lang v. Oppenheim, 96 Ind. 47; Bigham v. Tinsley, 160 Mo. App. 605, 140 S. W. 1193 (adopting opinion (1910), 130 S. W. 506, 149 Mo. App. 467); Bender v. Markle, 37 Mo. App. 234; Cobb v. Martin, 32 Okla. 588, 123 Pac. 422; Shamburg v. Abbott, 112 Pa. St. 6, 4 Atl. 518; Haskell v. Vaughan, 5 Sneed (Tenn.) 618.

[30] Reeves v. White (Tex. Civ. App.), 161 S. W. 43.

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for the breach of an agreement to enter into a partnership, or of an agreement to contribute to the capital stock, or in any other way assist in launching the partnership."[31] Equity may, however, grant relief in an action between the partners in regard to matters connected with the partnership business.[32] Judge Story says:[33] "But, although, in cases of the sort above mentioned, no remedy lies at law, yet in equity an appropriate remedy may and will be granted, wherever it is ex aequo et bono necessary and proper; for in equity, there is no difficulty in one partner's suing the other partners for money advanced, or contributions made, or liabilities incurred, simply on the ground that it has its foundation in a partnership transaction, if in other respects the suit is unobjectionable, as no technical difficulty occurs in equity, as to the joinder of all the proper parties to the suit. Indeed the ordinary remedy now administered, in matters of account, or requiring an account between partners, is exclusively in equity." Under the reformed codes, where the form of action at law and equity is the same, there are no greater rights of one partner to sue another than at common law or at equity and therefore in order to sue a copartner under the codes a partner must state facts sufficient to entitle him to equitable relief or bring his cause within the exceptions to the common-law rule.[34]

§ 744. Matters outside partnership.—As to matters which are merely transactions between partners as individuals, not connected with partnership matters, such as a sale by one partner of his individual property to a copartner, he may of course maintain an action at law.[35] One partner may sue another at law on a matter outside the scope of the partnership business,[36] or upon

[31] Miller v. Freeman, 111 Ga. 654, 36 S. E. 961, 51 L. R. A. 504.

[32] Veith v. Ress, 60 Nebr. 52, 82 N. W. 116; Sanger v. French, 157 N. Y. 213, 51 N. E. 979. See post § 773 et seq.

[33] Story Partnership (5 ed.), § 222.

[34] Page v. Thompson, 33 Ind. 137; Frye v. Sanders, 21 Kans. 26; Crosby v. Timolat, 50 Minn. 171, 52 N. W. 526; Russell v. Minnesota Outfit, 1 Minn. 162 (Gil. 136); Cole v. Reynolds, 18 N. Y. 74.

[35] Hartzell v. Murray, 224 Ill. 377, 79 N. E. 674; Elder v. Hood, 38 Ill. 533.

[36] Bull v. Coe, 77 Cal. 54, 18 Pac. 808, 11 Am. St. 235; Arnheim v.

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an item which has been separated from the partnership business.[37] Thus one partner may sue another for money borrowed by the latter to put into the partnership business.[38] "Where real estate held in common is sold, and one of the joint owners retains possession of the proceeds, the fact that he and the other joint owner are partners in the planting business is no bar to an action by such other joint owner for the recovery of his share of the price, where it does not appear that the property was held as a partnership asset."[39] An action at law may also be maintained after an accounting or after the partnership has been dissolved.[40] Hence, if a claim, although originally arising from the partnership relation, becomes an individual matter between the partners, there may be an action thereon between them.[41] A Kentucky case laid down the rule, that in order for an action to lie between members of a partnership, growing out of the firm business, there must have been a settlement of partnership

Gordon, 21 Cal. App. 754, 132 Pac. 840. "The real test is not solely whether the action can be tried without going into the partnership accounts, but whether the defendant has bound himself personally to the plaintiff." Paulk v. Creech, 8 Ga. App. 738, 70 S. E. 145; Mullany v. Keenan, 10 Iowa 224; Soule v. Frost, 76 Maine 119; Carpenter v. Greenop, 74 Mich. 664, 42 N. W. 276, 4 L. R. A. 241, 16 Am. St. 662; Bates v. Lane, 62 Mich. 132, 28 N. W. 753; Halleck v. Streeter, 52 Nebr. 827, 73 N. W. 219; Bank of British North America v. Delafield, 126 N. Y. 410, 27 N. E. 797; Jennings v. Pratt, 19 Utah 129, 56 Pac. 951; Coffin v. McIntosh, 9 Utah 315, 34 Pac. 247.

[37] Williams v. Henshaw, 11 Pick. (Mass.) 79, 22 Am. Dec. 366; George v. Benjamin, 100 Wis. 622, 76 N. W. 619, 69 Am. St. 963. Compare *McMahon v. Rauhr*, 47 N. Y. 67 (revg. 3 *Daly* (N. Y.) 116).

[38] *Bull v. Coe*, 77 Cal. 54, 18 Pac. 808, 11 Am. St. 235; Crater v. Bininger, 45 N. Y. 545. A contribution of capital to a firm does not constitute a loan to the other member thereof. The title to the money or property passes to the firm from the partner advancing it and he must look for reimbursement to the success of the partnership venture. Armstrong v. Hollen, 58 Ore. 534, 115 Pac. 423.

[39] Succession of Alexander, 130 La. 7, 57 So. 534 (syllabus by the court).

[40] Johnson v. Peck, 58 Ark. 580, 25 S. W. 865; Glade v. White, 42 Nebr. 336, 60 N. W. 556; Huffman v. Huffman, 63 S. Car. 1, 40 S. E. 963. "Where nothing is left to be done save the payment of an agreed balance, there can be no necessity of a resort to equity, at least in the absence of insolvency on the part of the defendant." Schmidt v. Mertes, 145 Wis. 468, 130 N. W. 474.

[41] Beede v. Fraser, 66 Vt. 114, 28 Atl. 880, 44 Am. St. 824.

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accounts, or an accounting between the parties, whereby a balance had been struck, or whereby one partner was found to be indebted to the firm in any sum on final settlement. Exceptions to the above rule are recognized in the above case, when the transaction out of which the liability arises is independent of or outside of the partnership business, or when the partnership covers a single venture, or but one transaction, so that no accounting is necessary. The court further said that the above rule is fundamental, and that it knows of no exceptions, other than those stated above.[41a] The only method recognized of arriving at the state of the accounts of the firm, by an action in the courts, is by an accounting, which has been treated under that heading.

§ 745. Partnership transactions not involving an accounting.—It is often stated as the rule that partners can sue each other at law on claims connected with the partnership relation but which do not require an accounting.[42] In most of the subsequent exceptions which are discussed, this element enters, and it will be found that most of the cases cited state, as one ground for making an exception, that an action of such character does not necessitate an accounting, as where there is a single transaction, or an individual transaction, a balance struck, a fraud on an individual, or a single unadjusted item of account.

[41a] Warring v. Arthur, 98 Ky. 34, 32 S. W. 221, 17 Ky. L. 605, citing: Lawrence v. Clark, 9 Dana (Ky.) 257; Stone v. Mattingly, 14 Ky. L. 113, 19 S. W. 402; Shearer v. Francis, 5 S. W. 559, 9 Ky. L. 556.

[42] Robinson v. Bullock, 58 Ala. 618; Durden v. Cleveland, 4 Ala. 225; Huyck v. Meador, 24 Ark. 191; Bull v. Coe, 77 Cal. 54, 18 Pac. 808, 11 Am. St. 235; Wells v. Carpenter, 65 Ill. 447; Berry v. De Bruyn, 77 Ill. App. 359; Mullany v. Keenan, 10 Iowa 224; Shearer v. Francis, 9 Ky. L. 556, 5 S. W. 559; Lane v. Tyler, 49 Maine 252; Gardner v. Cleveland, 9 Pick. (Mass.) 334; Whitehill v. Shickle, 43 Mo. 537; Stone v. Wendover, 2 Mo. App. 247; Halleck v. Streeter, 52 Nebr. 827, 73 N. W. 219; Wicks v. Lippman, 13 Nev. 499; Reid v. McQuesten, 61 N. H. 421; Reeves v. Goff, 3 N. J. L. 609; Howard v. France, 43 N. Y. 593; Esdaile v. Wuytack, 25 Abb. N. Cas. 474, 11 N. Y. S. 421, 33 N. Y. St. 145; Crater v. Bininger, 45 N. Y. 545 (affg. 54 Barb. (N. Y.) 155); Vance v. Blair, 18 Ohio 532, 51 Am. Dec. 467; Wright v. Cumpsty, 41 Pa. St. 102; Hill v.

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§ 746. Action on express stipulation.—In a Massachusetts case[43] the court quotes Mr. Lindley:[44] "It is said that an action at law for damages for the breach of an express agreement, entered into by one partner in favor of another, will only lie where the action can be properly tried without going into the partnership accounts, and the damages sought will belong exclusively to the plaintiff, and where the plaintiff will not be liable in any contingency, affecting the future joint business, to contribute to his own payment." The court adds: "But, without stopping to inquire whether this action can be maintained without violating these rules, it is sufficient to say that, whatever the nature of the agreement, it must be one in which the defendant binds himself personally to the plaintiff." Judge Story has stated as an exception to the general rule: "Wherever there is an express stipulation in the partnership articles, which is violated by any partner, an action at law, either assumpsit or covenant as the case may require, will ordinarily lie, to recover damages for the breach thereof."[45] The same rule holds as to any express individual contract between partners.[46] It has been

Palmer, 56 Wis. 123, 14 N. W. 20, 43 Am. Rep. 703; Smith v. Barrow, 2 T. R. 476; Windham v. Paterson, 1 Stark 144, 2 Rose 59n.

[43] Ryder v. Wilcox, 103 Mass. 24 (1869).

[44] Lindley Partnership, pp. 731-740.

[45] Story Partnership (7th ed.), § 218.

[46] Lyon v. Malone, 4 Port. (Ala.) 497; Bailey v. Starke, 6 Ark. 191; Wadley v. Jones, 55 Ga. 329; Haskins v. Curran, 4 Idaho 573, 43 Pac. 559; Kellogg v. Moore, 97 Ill. 282; Douthit v. Douthit, 133 Ind. 26, 32 N. E. 715; Powell v. Bennett, 4 Ind. App. 112, 29 N. E. 926; Truitt v. Baird, 12 Kans. 420; Bunton v. Dunn, 54 Maine 152; Roache v. Pendergast, 3 Har. & J. (Md.) 33; Ryder v. Wilcox, 105 Mass. 27; Rockwell v. Wilder, 4 Metc. (Mass.) 556; Hemenway v. Burnham, 90 Mich. 227, 51 N. W. 276; Kinney v. Robison, 52 Mich. 389, 18 N. W. 120; Morgan v. Nunes, 54 Miss. 308; Byrd v. Fox, 8 Mo. 574; McAuley v. Cooley, 45 Nebr. 582, 63 N. W. 871; Currier v. Webster, 45 N. H. 226; Bank of British North America v. Delafield, 126 N. Y. 410, 27 N. E. 797; Crater v. Bininger, 45 N. Y. 545; Townsend v. Goewey, 19 Wend. (N. Y.) 424, 32 Am. Dec. 514; Moore v. Gano, 12 Ohio 300; Leidy v. Messinger, 71 Pa. St. 177; Lawrence v. Mangold, 1 Walk. (Pa.) 202; Lockhart v. Lytle, 47 Tex. 452; Collamer v. Foster, 26 Vt. 757; Wright v. Michie, 6 Grat. (Va.) 354; Edwards v. Remington, 51 Wis. 336, 8 N. W. 193; Neale v. Turton, 4 Bing. 149, 13 E. C. L. 149.

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said, however, that a "consideration of the statement, and of the authorities cited to sustain it, will show that the cases falling within this exception are of three classes: (1) Those in which the partnership is inchoate and has never been launched; (2) those in which the partnership is at an end; and (3) those in which the stipulation which is violated, and for the breach of which the action is brought, is one between the partners individually, and the damages from which belong exclusively to the other partner, and can be assessed without an accounting."[47] The parties may waive the objection, however, that the suit is for an accounting, where all the partnership transactions are so completed as to make nothing necessary but the ascertainment of the money balance due from certain of the partners to others.[48] Where there was an agreement expressly to pay one partner rent as lessor, he could take summary proceedings to recover it.[49] Some cases have held that a partner has a right of action where a copartner agreed to make a settlement at a future date and failed to perform his agreement.[50] So if there has been a settlement and a partner has engaged in the contract of settlement to do certain things, he may be sued in law for his nonperformance, by a partner who has performed his part of the contract.[51]

§ 747. Action on preliminary agreement.—As to agreements entered into by parties before the partnership relation was formed, the ordinary rules that one partner can not sue another at law do not apply. Thus it is generally held that an action at

[47] Miller v. Freeman, 111 Ga. 654, 36 S. E. 961, 51 L. R. A. 504. And compare, Tevis v. Carter, 111 Ky. 938, 23 Ky. L. 1270, 65 S. W. 17. See also Eastman v. Dunn, 34 R. I. 155, 83 Atl. 1057.

[48] Smith v. Putnam, 107 Wis. 155, 82 N. W. 1077, 83 N. W. 288.

[49] Mulligan v. Kraus, 88 Misc. 538, 151 N. Y. S. 401.

[50] Holyoke v. Mayo, 50 Maine 385; Gilbert v. Howard Mach. Co., 147 N. Car. 308, 61 S. E. 176; Tiernein v. Sachs, 52 Ore. 560, 98 Pac. 163. See also Blodgett v. Miller, 33 Ky. L. 682, 110 S. W. 864.

[51] Geise v. Ragan, 80 Ga. 732, 6 S. E. 697; Meredith v. Ewing, 85 Ind. 410; Martin v. Good, 14 Md. 398, 74 Am. Dec. 545; Ferguson v. Baker, 116 N. Y. 257, 22 N. E. 400; Lippincott v. Low, 68 Pa. St. 314; Jewell v. Ketchum, 63 Wis. 628, 23 N. W. 709; Thornbury v. Bevill, 6 Jur. 407, 1 Y. & Coll. 554.

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law will lie against a partner for noncompliance with an agreement for launching a partnership.[52] As said in one case:[53] "An action can not be maintained by one partner against another for a partial accounting, but he must either sue for a complete settlement and winding up of the partnership matters, or to recover a balance struck and agreed upon between them. * * * This is a correct statement of the general rule; but it has no application to this case, which comes within the exceptions. * * * This is not an action for a partial adjustment and statement of partnership dealings, but it is an action to recover damages because the defendant refused and failed to comply with his preliminary agreement and the terms upon which the partnership was to be formed; and, if said partnership was formed, then for damages because the defendant failed to do and perform what he agreed to do before it was formed." Also, if this preliminary agreement contains certain individual covenants binding the parties to do certain things before the relationship begins, and made a condition precedent to its formation, an action at law will lie for their breach.[54] For example, where two persons contemplated entering into a milling partnership, and one was to repair

[52] Haller v. Willamowicz, 23 Ark. 566; Murrell v. Murrell, 33 La. Ann. 1233; Murphy v. Crafts, 13 La. Ann. 519, 71 Am. Dec. 519; Phillips v. Reeder, 18 N. J. Eq. 95; Herrick v. Ames, 8 Bosw. (N. Y.) 115; Glover v. Tuck, 24 Wend. (N. Y.) 153; Marsh's Appeal, 69 Pa. St. 30, 8 Am. Rep. 206; Campbell v. Campbell, 7 Cl. & F. 166.

[53] Owen v. Meroney, 136 N. Car. 475, 48 S. E. 821, 103 Am. St. 952, 1 Ann. Cas. 834.

[54] Robinson v. Bullock, 58 Ala. 618; Scott v. Campbell, 30 Ala. 728; Boyd v. Mynatt, 4 Ala. 79; Grigsby v. Nance, 3 Ala. 347; Bumpass v. Webb, 1 Stew. (Ala.) 19, 18 Am. Dec. 34; Truitt v. Baird, 12 Kans. 420; Thomas v. Pyke, 4 Bibb. (Ky.) 418; Dana v. Gill, 5 J. J. Marsh. (Ky.) 242, 20 Am. Dec. 255; Clay v. Grubbs, 1 Litt. (Ky.) 222; Gusdorf v. Schleisner, 85 Md. 360, 37 La. Ann. 170; Wadsworth v. Manning, 4 Md. 59; Dunham v. Gillis, 8 Mass. 462; Capen v. Barrows, 1 Gray (Mass.) 376; Cook v. Canny, 96 Mich. 398, 55 N. W. 987; Glover v. Tuck, 24 Wend. (N. Y.) 153; Townsend v. Goewey, 19 Wend. (N. Y.) 424, 32 Am. Dec. 514; Duncan v. Lyon, 3 Johns. Ch. (N. Y.) 351, 8 Am. Dec. 513; Halliday v. Carman, 6 Daly (N. Y.) 422; Vance v. Blair, 18 Ohio 532, 51 Am. Dec. 467; McArthur v. Ladd, 5 Ohio 514; Kinloch v. Hamlin, 2 Hill Eq. (S. Car.) 19, 27 Am. Dec. 441; Terrill v. Richards, 1 Nott & McC. (S. Car.) 20; Cocke v. Evans, 9 Yerg. (Tenn.) 287;

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a road, build a dam and ferry and furnish money to equip a mill, but failed to do so, an action by his copartner for damages would lie.[55]

§ 748. Partnership for single transaction.—Where the association as partners is for a single transaction, one partner at its close may maintain an action at law against the other for his share of the profits and a formal accounting is unnecessary.[56] Such a relationship is not exactly similar to other forms of partnership, it being a joint adventure rather.[57]

§ 749. Action on agreement for contribution to partnership fund.—The rule being established, in general, that a suit can only be maintained at law between partners when one partner has bound himself personally to the other individually rather than as a member of the firm, the more difficult question as to what constitutes individual indebtedness arises. For example, can suit be maintained by one partner, at law, for contributions to the partnership funds; another partner having agreed to furnish said funds and failed to do so? As said in one case: "The agreements * * * for contribution to the partnership funds and property which each is to make, are binding by name on each, and would no doubt be classed with those express agree-

Looney v. Gillenwaters, 11 Heisk. (Tenn.) 133; Merriwether v. Hardeman, 51 Tex. 436; Hunt v. Reilly, 50 Tex. 99; Venning v. Leckie, 13 East 7, 12 R. R. 292.

[55] Owen v. Meroney, 136 N. Car. 475, 48 S. E. 821, 103 Am. St. 952, 1 Ann. Cas. 834.

[56] Wann v. Kelly, 2 McCray (U. S.) 628; Myers v. Winn, 16 Ill. 135; Crossley v. Taylor, 83 Ind. 337; Clarke v. Mills, 36 Kans. 393, 13 Pac. 569; Pettingill v. Jones, 28 Kans. 749; White v. Jouett, 147 Ky. 197, 144 S. W. 55; Lawrence v. Clark, 9 Dana (Ky.) 257, 35 Am. Dec. 133; Jenkins v. Howard, 21 La. Ann. 597; Byrd v. Fox, 8 Mo. 574; Rankin v. Fairley, 29 Mo. App. 587; McCormick v. Largey, 1 Mont. 158; Jaques v. Hulit, 16 N. J. L. 38; Foster v. Vanauken, 4 N. J. L. 98; Burleigh v. Bevin, 22 Misc. 38, 48 N. Y. S. 120; Musier v. Trumpbour, 5 Wend. (N. Y.) 274; Kutz v. Dreibelbis, 126 Pa. St. 335, 17 Atl. 609, 24 W. N. C. (Pa.) 67; Hamilton v. Hamilton, 18 Pa. St. 20; Fry v. Potter, 12 R. I. 542; Coffin v. McIntosh, 9 Utah 315, 34 Pac. 247; Robson v. Curtis, 1 Stark 78, 2 E. C. L. 39; Bovill v. Hammond, 6 B. & C. 149, 13 E. C. L. 149.

[57] Price v. Drew, 18 Fla. 670; Halsted v. Schmelzel, 17 Johns. (N. Y.)

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ments which may be the foundation of an action."[58] In this case, the court decided against the plaintiff, but without repudiating the general rule recognized by it and quoted above. "In the opinion of the court," it was said, "upon the case stated in this declaration, no action at law can be maintained. If the declaration could be taken as alleging an entire repudiation by the defendant of the contract and of the relation of partnership, with a claim of damages for such a breach of the contract, instead of compensation for services in conducting the business, and for a share of its profits, such an action might be maintainable. We do not so understand its allegations. A failure and refusal by the defendant to perform his promise and agreement is indeed charged together with an exclusion of the plaintiff, and a refusal to acknowledge that he has any rights under the contract. But it also alleges a refusal to make the annual settlement of accounts and annual payments, according to the contract, and sets forth a continuance of the business upon the premises and with the tools and appliances of the plaintiff, with large profits therefrom from a participation in which he has been excluded. The remedy in such cases is in equity, where the power to investigate accounts, to compel specific performance, and to restrain breaches of duty for the future, affords the only relief which can be had." In another case[59] two partners expressly agreed with a third partner that they would pay him certain advances to the capital made by him for them. "Under those circumstances," said the court, "the money so advanced becomes the debt of the promisors, recoverable by direct action therefor, without dissolution of partnership or adjustment of partnership accounts."[60] In a Wisconsin case,[61] quoted and approved in the above case, it is said: "Where there is an

80; Leidy v. Messinger, 71 Pa. St. 177; Sprout v. Crowley, 30 Wis. 187. See ch. 30.

[58] Ryder v. Wilcox, 103 Mass. 24; citing Venning v. Leckie, 13 East 7, 12 Rev. Rep. 292; Brown v. Tapscott, 6 M. & W. 119, 9 L. J. Ex. 139.

[59] Haskins v. Curran, 4 Idaho 573, 43 Pac. 559 (1895).

[60] Citing: 2 Lindl. Partnership, p. 1350, latter part of note 2, T. Parsons Partnership, 285 et seq.

[61] Sprout v. Crowley, 30 Wis. 187. See also Gauger v. Pautz, 45 Wis.

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express agreement by one partner to repay to the other his share of advances made by the latter on account of partnership business, the amount of such share becomes thereby the debt of the partner who has thus agreed to pay the same, which may be recovered in an action brought directly therefor, without any regard to the partnerships existing between the parties or the state of the firm accounts." It is thus seen that a suit at law may be maintained by a partner against his copartner upon a contract to contribute to the firm capital, even when there are other differences between them, provided the contract was personal between the partners themselves, and this without violating the general rule regarding remedies.[62] The reason is very apparent, inasmuch as the contract is personal between them, and does not, primarily affect their partnership relations, as such. The only difficulty arises in the application of this rule to the various agreements as to whether they are personal, and if the affairs of the whole firm are involved and an accounting becomes necessary there can be no recovery.[63] This exception to the rule that no actions will lie between partners, while well founded and logical, may, nevertheless, work hardships, as there might be, for example, two men in partnership, one of whom may have contributed his capital, but who has become deeply indebted to the firm. The other partner may not have paid in his capital, yet, upon an accounting, may have a large amount due him, by reason of his partner's withdrawals, yet his only remedy would be an equitable accounting, whereby he might not

449; Webb v. Butler (Ala.), 68 So. 369.

[62] Griggsby v. Nance, 3 Ala. 347; Bumpass v. Webb, 1 Stew. (Ala.) 19, 18 Am. Dec. 34; Bull v. Coe, 77 Cal. 54, 18 Pac. 808, 11 Am. St. 235; Wright v. Eastman, 44 Maine 220; Wetherbee v. Potter, 99 Mass. 354; Williams v. Henshaw, 11 Pick. (Mass.) 79, 22 Am. Dec. 366; Cinnamond v. Greenlee, 10 Mo. 578; Currier v. Rowe, 46 N. H. 72; Currier v. Webster, 45 N. H. 226; Reeves v. Goff, 3 N. J. L. 194; Gordon v. Titus, 66 Barb. (N. Y.) 275; Gordon v. Boppe, 55 N. Y. 665; Ridgway v. Kleinert, 15 Leg. Int. (Pa.) 117; Venning v. Leckie, 13 East 71, 12 Rev. Rep. 292; Helme v. Smith, 7 Bing. 709, 20 E. C. L. 316.

[63] Currier v. Rowe, 46 N. H. 72.

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be enabled to set up his rights as a counterclaim to his partner's suit at law for contribution.

§ 750. Action on personal promises of pay for services. —Often one partner will give attention to the firm business, greater in time or value than the other partner gives, and the question may arise as to whether or not he may commence a suit at law against his copartner therefor. We have heretofore seen that, as a general rule, in the absence of a specific contract therefor, he can not recover. What, then, if there is a contract for compensation therefor? If the contract is simply a partnership contract, recovery may be had in equity against the firm, but not at law, as he would then be both plaintiff and one of the defendants, which is against the policy of the law. If, on the other hand, one partner personally obligates himself to his copartner to pay him for his services, and the contract is valid on other grounds, it may be enforced by an action at law between the contracting partners. The law on this question, and the basis thereof, is similar to that upon the question of agreements for contribution to firm capital. In the case before quoted,[64] the court said: "The principles we are considering are illustrated in the case of Paine v. Thacher,[64a] where it was held that, if one partner promises another partner to pay him a compensation for personal attention to the business of the concern, this promise may be enforced at law, notwithstanding the existence of the partnership and written articles providing for such payment. Nelson, C. J., says, in this that the item for services had been adjusted, and there was an express promise to pay it, and the compensation was to be contributed as a part of the capital, to be furnished by the defendant in lieu of personal attention. It is plain that there can be no recovery at law for work and labor for the firm or for contribution to its funds, in the absence of an express agreement of the defendant; and the plaintiff does not aid his case by alleging a willingness

[64] Ryder v. Wilcox, 103 Mass. 24 (1869). [64a] 25 Wend. (N. Y.) 450.

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to perform, and a prevention by the defendant. The rights of the parties are regulated by the general principles of the law of partnership, when not changed by special agreement." In another case it was said:[65] "The plaintiff and defendant, with several others, were associated together in business—they were partners in trade. If the contract which gave rise to this action was entered into by such of the members of the concern as were present in their individual characters, if it was a personal contract, then the plaintiff, under the pleadings in the cause, would be entitled to recover; as there is nothing to prevent one partner from suing another on a mere private undertaking. But if the undertaking by the defendant and the other partners present was not merely personal, but on account of the copartnership, the plaintiff is not entitled to recover; on the general principle, that one partner can not maintain an action against his copartners for work and labor done, etc., on account of the partnership. And we think that the engagement by the defendant and the others of the concern who were present to give the plaintiff five hundred dollars for going abroad on the business of the concern, in which he, as a partner, was equally interested as the other partners, was not a private individual contract, but an undertaking on account of the concern. The same engagement entered into with a stranger would have been binding on the firm; and the present plaintiff, as a member of that firm, must have contributed his proportionate part of the sum contracted to be paid. And what is there in the mere circumstance of his being employed as the agent to transact the business required to be done in the place of a stranger, to give to the same terms an entirely different meaning and character, and to turn into a separate individual undertaking on the part of some of the partners a contract which in the case of another would have been considered as made on account of and binding upon the firm? We can perceive nothing. The services rendered were for and on account of the firm, and the compensation for those services to be paid

[65] Causten v. Burke, 2 Har. & G. (Md.) 295, 18 Am. Dec. 297.

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by the firm, and his just proportion of that compensation to be borne by the plaintiff, as one of the firm. He could not sue the firm of which he was himself a member, nor can he sustain this suit against one of his copartners for services rendered the firm."

§ 751. Action upon account stated or balance due.—It has been repeatedly held by our courts that when an account has been reached between the partners, whereby one partner becomes indebted to another partner, an action at law may be maintained thereon and after an accounting and an adjustment of the rights and liabilities growing out of the partnership one partner may sue another for a balance due.[66] An Illinois case[67] holds that, on the settlement of partnership matters, where there is a disputed item which one of the partners alleges he has paid to a third person for the other partner, and agrees to pay it to him if the third person does not, and a settlement is made on that basis, the item being charged to the partner for whom it was claimed to have been paid, this partner can afterward maintain an action at law against the partner making the representation, if it be shown that he did not, in fact, so pay the said money to the third person as represented. The same principle was involved, and the same general conclusion was reached in a Missouri case,[68] in which the facts were as follows: There had been a

[66] Douthit v. Douthit, 133 Ind. 26, 32 N. E. 715; Halderman v. Halderman, Hemp. 559, Fed. Cas. No. 5909; McGehee v. Dougherty, 10 Ala. 863; Downs v. Short, 6 Pennew. (Del.) 624, 66 Atl. 365; Purvines v. Champion, 67 Ill. 459; Hanks v. Baber, 53 Ill. 292; Thompson v. Smith, 82 Iowa 598, 48 N. W. 988; Wycoff v. Purnell, 10 Iowa 332; Williams v. Henshaw, 11 Pick. (Mass.) 79, 22 Am. Dec. 366; Fanning v. Chadwick, 3 Pick. (Mass.) 420, 15 Am. Dec. 233; Holman v. Nance, 84 Mo. 674; Scott v. Caruth, 50 Mo. 120; McGinty v. Orr, 110 Mo. App. 336, 85 S. W. 955; Nims v. Bigelow, 44 N. H. 376; Jaques v. Hulit, 16 N. J. L. 38; Mackey v. Auer, 8 Hun (N. Y.) 180; Knerr v. Hoffman, 65 Pa. St. 126; Summerson v. Donovan, 110 Va. 657, 66 S. E. 822, 19 Ann. Cas. 253; Smith v. Putnam, 107 Wis. 155, 82 N. W. 1077, 83 N. W. 288; Logan v. Trayser, 77 Wis. 579, 46 N. W. 877; Wray v. Milestone, 5 Mees. & W. 21.

[67] Adams v. Funk, 53 Ill. 219, cited in Glade v. White, 42 Nebr. 336, 60 N. W. 556 (1894).

[68] Russell v. Grimes, 46 Mo. 410.

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partnership accounting by action, in which the debts due the firm were divided between the partners. Thereafter it was ascertained that one of the partners had collected a portion of certain notes payable to the firm, which had been turned in to the other partner at their face. The court said: "The petition so far does not seek to settle the partnership accounts, nor does it attack the settlement already made. It simply charges the defendant with having received money upon claims which, by the settlement, became the individual property of the plaintiff; and the plaintiff then acquired a separate property, not only in the balance due upon those claims, but, as against his partner, to their full amount." It was held that an action at law could be maintained by the injured partner against his copartner.[69]

§ 752. **Action on promissory notes.**—If partners agree upon certain differences between them, and one gives therefor a promissory note to his copartner, he may be sued thereupon by his copartner, in an action at law, regardless of the condition of the accounts of the firm, as the giving of the note, upon the agreement, is of the same effect as any account stated, as far as it extends. As Chief Justice Marshall says:[70] "It is alleged that at law, one partner can sue another on a claim growing out of the partnership in no other case than for a general balance on a stated account. The terms in which this proposition has been laid down are, perhaps, too general. * * * The principle that a company can not sue its members does not apply to the case; nor does the principle that a partner can not sue a partner on a partnership transaction apply to any case where a note in writing is given for money, not to a firm, but to an individual member." So it would appear that an action at law is maintainable by one partner against another upon a promissory note executed by the one to the other, involving particular items or transactions of the partnership business, upon the ground that the giving of the note is an isolation or separation of the par-

[69] Ross v. West, 2 Bosw. (N. Y.) 360; Crosby v. Nichols, 3 Bosw. (N. Y.) 450; Wicks v. Lippman, 13 Nev. 499.

[70] Van Ness v. Forrest, 8 Cranch (U. S.) 33.

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ticular matter from the general partnership account, and that an accounting and final settlement of the partnership affairs is not necessarily involved in such action; that the execution of the note is such an acknowledgment of isolation or elimination of the particular transaction from the general partnership account as that the maker will be estopped at law from questioning the holder's right of action thereon.[71] Numerous other cases also hold that one partner may sue another partner upon such a note.[72] There are some cases[73] holding that a note given by one partner to another in settlement of certain partnership affairs, before a final settlement of the partnership, is but a nudum pactum and can not be sued upon by law, but the general rule is as is stated above, namely, that such suit may be maintained. Of course, circumstances might be such that a court of equity would enjoin the suit upon the note, but this involves a very different question from the one under discussion, and expressly recognizes, rather than denies the legal right to sue upon the note, at law, by restraining this right upon equitable grounds.[74]

§ 753. Action for damages for breach or abandonment of partnership agreement.—A question of considerable importance arises, as to the right of one partner to sue another partner in an action at law, for a breach of the partnership agreement. The subject may be divided into two parts: (1) Where the breach goes to the whole agreement; (2) where the breach goes only to some particular covenant or covenants in the agreement. In the first case, it has been held,[75] probably in accord with the prevalent rule, that: "If the declaration could be taken as alleg-

[71] Wilson v. Wilson, 26 Ore. 251, 38 Pac. 185.

[72] Scott v. Campbell, 30 Ala. 728; Griggsby v. Nance, 3 Ala. 347; Sturges v. Swift, 32 Miss. 239; Merrill v. Green, 55 N. Y. 270; Wilson v. Wilson, 26 Ore. 251, 38 Pac. 185; Bonnaffe v. Fenner, 6 Smedes & M. (Miss.) 212, 45 Am. Dec. 278. See also 1 Coll. Partnership, 257.

[73] Stafford v. Fargo, 35 Ill. 481; Martin v. Stubbings, 20 Ill. App. 381; Sewell v. Cooper, 21 La. Ann. 582.

[74] Wilson v. Wilson, 26 Ore. 251, 38 Pac. 185.

[75] Ryder v. Wilcox, 103 Mass. 24 (1869).

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ing an entire repudiation by the defendant of the contract and of the relation of partnership, with a claim of damages for such a breach of the contract, instead of compensation for services in conducting the business, and for a share of the profits, such an action might be maintainable." As to the second division of the question, the same case approves the principle propounded in another case[76] that: "An action to recover damages, brought by one partner against his copartner, for neglect of partnership business, could not be maintained while the affairs of the firm remain unsettled, although it was expressly agreed that each partner should devote his whole time to the partnership business."[77] The difference in the two cases may be easily distinguished, upon investigation, as suit upon the first proposition does not involve an accounting, nor does it touch the question of a party being both plaintiff and defendant, but is rather a suit for a breach of a personal agreement between the parties, and corresponds more closely to suits for contribution to capital or personal agreements for compensation for services, between the parties, while a suit upon the second proposition does involve an accounting of the partnership affairs, and is a partnership affair, rather than a personal matter between the partners. As said in one case:[78] "There do not seem to be any special rules of law applicable to covenants contained in partnership articles and not to other covenants; and we may therefore say, without discussion, that an action will lie for a breach of covenant, no matter in what instrument the covenant be found. We may further affirm that no rule of law declares that the breach of a covenant contained in partnership articles shall be compensated only by nominal damages. The measure of damages must depend upon the nature of the obligation, and the extent of the injury

[76] Capen v. Barrows, 1 Gray (Mass.) 376.

[77] See also Fanning v. Chadwick, 3 Pick. (Mass.) 420, 15 Am. Dec. 233; Williams v. Henshaw, 11 Pick. (Mass.) 79, 22 Am. Dec. 366; Miller v Freeman, 111 Ga. 654, 36 S. E. 961, 51 L. R. A. 504; Holmes v. Higgins, 1 B. & C. 74, 2 D. & R. 196, 1 L. J. (O. S.) K. B. 47.

[78] Bagley v. Smith, 10 N. Y. 489, 19 How. Pr. 1, 61 Am. Dec. 756, Seld. notes 109.

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in this as in all other cases of broken covenants." So one partner may sue another at law in assumpsit for a wrongful dissolution brought about by a partner's bad faith,[79] even though an action of account or bill in equity was necessary in order to settle the partnership accounts, or, for an abandonment or repudiation of the contract and relationship;[80] or premature dissolution.[81] It has been denied, however, that one partner is liable in tort for a bad faith termination of the partnership agreement.[82]

§ 754. **Action upon one item unadjusted.**—Oftentimes there is an association of individuals for the performing of a single transaction, and in case of differences among them, in settlement of this transaction, it becomes of importance as to what remedy to pursue in establishing their respective rights under the association agreement. The right to sue at law was recognized,[83] where the plaintiff sued the defendants, in an action at law, for one-third of the commissions received upon the sale of a certain mining property, the plaintiff claiming that there was an agreement between himself and the defendants that each should receive one-third of the commissions received by reason of the sale. Defendants claimed that the complaint showed that there was a partnership between the parties to the suit, and that, if such were the case, a suit for an accounting would be the proper remedy. The court held that under the circumstances of the case, there was a partnership between the parties, and further, that even "if there was a partnership, there being but one item unadjusted, the kind of action brought by the plain-

[79] McCollum v. Carlucci, 206 Pa. 312, 55 Atl. 979, 98 Am. St. 780.

[80] Taylor v. Nelson, 26 Cal. App. 681, 147 Pac. 1189; Tichenor v. Neuman, 186 Ill. 264, 57 N. E. 826; Child v. Swain, 69 Ind. 230; Wadsworth v. Manning, 4 Md. 59; Jewett v. Brooks, 134 Mass. 505; Terry v. Carter, 25 Miss. 168.

[81] Karrick v. Hannaman, 168 U. S. 328, 42 L. ed. 484, 18 Sup. Ct. 135; Bagley v. Smith, 10 N. Y. 489, 61 Am. Dec. 756, 19 How. Pr. 1, Seld. notes 109; Westwood v. Cole, 120 N. Y. S. 884; Haganaers v. Herbst, 30 App. Div. 546, 52 N. Y. S. 360 (affd. 164 N. Y. 603, 58 N. E. 1088); Addams v. Tutton, 39 Pa. St. 447.

[82] Freund v. Murray, 39 Mont. 539, 104 Pac. 683, 25 L. R. A. (N. S.) 959.

[83] Mason v. Sieglitz, 22 Colo. 320, 44 Pac. 588 (1896).

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tiff would lie at common law; and under the code, there being but one form of civil action, if the facts set up in the complaint entitle the plaintiff to any kind of relief, if the evidence warrants it, such relief will be awarded."[84] So where a partnership has been dissolved and there has been an account as to everything but one item, one partner may sue at law with regard to that item since there are no equities to be adjusted and no need for an accounting.[85] "Nor is it necessary that this (the balance due) should be a fixed, ascertained balance, as a result of a settlement of the accounts of the firm between the partners. It is enough if it appear that the firm is dissolved and that there are no outstanding debts due to or from the copartnership, so that the action of assumpsit to recover the balance due one of the firm will effect a final settlement between the partners."[86] An express promise to pay such balance is unnecessary for an action may be brought on an implied promise.[87] This rule has been applied after dissolution in cases where a partner paid partnership debts;[88] where one partner appropriated to his own use a specific sum

[84] Citing: Wann v. Kelly, 5 Fed. 584, 2 McCrary, 628; Pettingill v. Jones, 28 Kans. 749; Sikes v. Work, 6 Gray (Mass.) 433; Buckner v. Ries, 34 Mo. 357; Meason v. Kaine, 63 Pa. St. 335; Galbreath v. Moore, 2 Watts (Pa.) 86.

[85] Cookes v. Lymperis, 178 Mich. 299, 144 N. W. 514; Dorwart v. Ball, 71 Nebr. 173, 98 N. W. 652, 8 Ann. Cas. 766; Hutchinson v. Murray (Tex. Civ. App.), 169 S. W. 640; Robson v. Curtis, 1 Stark. 78; Heffernan v. Sheridan, 11 Quebec K. B. 3. See also Mason v. Sieglitz, 22 Colo. 320, 44 Pac. 588; Benton v. Hunter, 119 Ga. 381, 46 S. E. 414; Purvines v. Champion, 67 Ill. 459; Erret v. Pritchard, 121 Iowa 496, 96 N. W. 963; Farwell v. Tyler, 5 Iowa 535; Pritchard v. Ford, 1 J. J. Marsh. (Ky.) 543; Moran v. LeBlanc, 6 La. Ann. 113; Shattuck v. Lawson, 10 Gray (Mass.) 405; Cockrell v. Thompson, 85 Mo. 510; Byrd v. Fox, 8 Mo. 574; Jackson v. Powell, 110 Mo. App. 249, 84 S. W. 1132; Lord v. Peaks, 41 Nebr. 891, 60 N. W. 353; Gibson v. Moore, 6 N. H. 547; Arnold v. Arnold, 90 N. Y. 580. And compare Halsted v. Schmelzel, 17 Johns. (N. Y.) 80; Brown v. Agnew, 6 Watts & S. (Pa.) 235; Sawyer v. Proctor, 2 Vt. 580.

[86] Sikes v. Work, 6 Gray (Mass.) 433.

[87] Purvines v. Champion, 67 Ill. 459; Fanning v. Chadwick, 3 Pick. (Mass.) 420, 15 Am. Dec. 233.

[88] Farwell v. Tyler, 5 Iowa 535; Cockrell v. Thompson, 85 Mo. 510; Brown v. Agnew, 6 Watts & S. (Pa.) 235.

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of partnership money;[89] where a partner advanced more than his share of money to pay firm debts;[90] where there was no accounting as to a partnership note;[91] and where there had been errors or omissions in the settlement.[92] So if the partners separate an item before dissolution and adjust it, it has been held an action at law may be maintained on such matter.[93]

§ 755. Assumpsit.—Many of the cases which have been cited in which partners have been allowed to sue each other at law fall under the common-law action of assumpsit.[94] It was said in a leading case:[95] "It is true, however, that there are cases in which one partner has been allowed to maintain assumpsit against another. But upon examination of such cases, it will be found, as we apprehend, either that the subject-matter of the suit had never properly belonged to the partnership concern, as in the case of Smith v. Barrow,[95a] or that, if it ever had belonged to the partnership concern, there had been some distinct and explicit act of the parties, by which distinct and separate interests and liabilities had been created, as in the case of Foster v. Allanson,[95b] and Wight v. Hunter;[95c] and it may be that where the partnership embraces a single transaction, the general rule would not apply. But we have found no case of a multifarious partnership, in which, while the accounts of the partnership remain unsettled, one partner has been allowed to recover from another, in an action at law, either an alleged excess received by the defendant of a particular debt due to the firm, or the alleged excess paid by the plaintiff, in discharge of a debt due by the firm, unless the particular debt

[89] Erret v. Pritchard, 121 Iowa 496, 96 N. W. 963.

[90] Wheeler v. Arnold, 30 Mich. 304.

[91] Whetstone v. Shaw, 70 Mo. 575.

[92] Donahue v. McCosh, 70 Iowa 733, 30 N. W. 14; Fanning v. Chadwick, 3 Pick. (Mass.) 420, 15 Am. Dec. 233; Jackson v. Powell, 110 Mo. App. 249.

[93] Holyoke v. Mayo, 50 Maine 385; Gibson v. Moore, 6 N. H. 547; Neil v. Greenleaf, 26 Ohio St. 567.

[94] Holmes v. Hunt, 122 Mass. 505, 23 Am. Rep. 381. See cases cited in preceding sections.

[95] Lawrence v. Clark, 9 Dana (Ky.) 257, 35 Am. Dec. 133.

[95a] 2 T. R. 476.

[95b] 2 T. R. 479.

[95c] 1 East 20.

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had, in each case, been separated by mutual act of the parties, from its connection with their general joint concerns. And we do not perceive any solid ground for distinguishing between the sole payment of a partnership debt by any partner, out of his private means, and the reception and appropriation of an entire partnership debt by one partner for his private use. As between the partners, the duty of contribution, in the first case, as well as the right of participation in the latter, depends upon the state of the accounts between them; and for the ascertainment and settlements of those accounts, if they extend beyond the single transaction, the action of assumpsit is not the appropriate remedy, nor a jury the proper tribunal. Accordingly, we find it laid down in Chitty on Pleadings,[95d] 'that in case of a general unsettled account between partners, one who has been compelled to pay the whole of a creditor's demand can not sue his copartner at law.' For this position, which is obviously supported by the same reasons on which the well-established general rule is founded, he refers to the case of Robson v. Curtis,[95e] by which the position is fully sustained. Without going into the account between the partners, it is impossible to say that the defendant is debtor to the plaintiff. To say that the plaintiff having shown himself in advance to the firm in this particular transaction, it is incumbent on the defendant to show, if he can, that by reason of similar advances on his part, or otherwise, he is still not indebted to the plaintiff, would be to make a settlement of the accounts in this action; while, on the other hand, it would be obviously unjust, and might, in many instances, lead to great hardships, as it certainly would violate the generally received principles on the subject, to allow one partner, whenever he might pay a particular demand against his firm, to enforce contribution by action at law, without allowing the defendant to show that, notwithstanding such payment, he owes the plaintiff nothing. We do not perceive any safe ground for distinguishing a compulsory from a voluntary payment, as to the right which the one or the other should

[95d] Vol. I, p. 45, Springfield ed., 1833.

[95e] 1 Stark. 78.

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confer upon a partner." The rule in general is that assumpsit will not lie where an accounting is necessary to determine the amount due.[96]

§ 756. **Action for damages for fraud of partners.**—In case of fraud by one partner in the partnership matters, can another maintain an action at law against him therefor? The question is decided, very generally in the affirmative by our courts. "It may be laid down as a general rule, that before one partner can sue another at law, the settlement of the firm must be complete, and his right to recover only arises after a settlement of all partnership business. * * * Among the exceptions to the general rule is the right of one partner to maintain an action against another for the destruction of the joint property, or its wrongful conversion."[98] In a case[99] where a settlement was arrived at between the partners, upon the basis of the accounts as shown in the partnership books which were kept by one of the partners, it later developed that the partner had improperly kept the said books, and had not charged himself thereon with certain amounts of money drawn by him. The defrauded partner commenced a suit at law, against his partner's bondsmen for the money received by the guilty partner, and not accounted for. The parties so sued defended the suit upon the ground that no suit at law could be maintained between the partners until a settlement had been had between them. The court held, however, "that there was just such a settlement and an adjustment of the liability of each upon a false, misleading basis furnished by the partner, for the faithful performance of whose duties in that very respect the plaintiff's in error were liable. This action was not to wind up a partnership, but was for the failure of one partner to perform certain duties as he had contracted with another person to do them. True, these duties pertained to partnership affairs between the contracting parties; the

[96] Bartlett v. Parks, 1 Cush. (Mass.) 82.

[98] Newby v. Harrell, 99 N. Car. 149, 5 S. E. 284, 6 Am. St. 503, citing Lucas v. Wasson, 3 Dev. (N. Car.) 398; Coll. Partnership, 382.

[99] McAuley v. Cooley, 45 Nebr. 582, 63 N. W. 87 (1895).

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undertaking in this respect was none the less that of Bentley (the defrauding partner) individually, and for the faithful performance of such individual undertaking plaintiffs in error (bondsmen) were liable." Inasmuch as the above case seems to deal chiefly with the duty of the bondsmen, it might seem at first view that a different principle were involved, but such is not the case, as the partner for whom the parties sued were responsible, would also have been equally liable and in the same suit, at least in most states, as were the bondsmen, for it is generally held that after dissolution one partner is liable in an action at law in the nature of deceit for damages sustained by his copartner because of his fraud in the settlement,[1] or, in some jurisdictions he may recover in assumpsit.[2] Neil, J., of Tennessee,[3] in a very scholarly opinion, shows a very deep insight into the question. "But," said he, "is a partner responsible for a fraudulent conversion of stocks belonging to the firm within this rule? We see no reason why he should not be. If his wrongful act amounts to a fraudulent conversion, within the technical meaning of that term, the effect upon those injured by his act is the same as if he were not a partner, and the legal quality of the act is the same, inasmuch as to hold the act complained of a fraudulent conversion necessarily is tantamount to saying that his relation of partner did not, under the circumstances, justify his act. But under what circumstances is a partner liable for a conversion—that is to say, a fraudulent conversion? 'It is not, as I understand it,' said the Master of the Rolls in Ex parte Harris,[3a] 'necessary for the joint estate to prove more than, in the words of Lord Eldon, that the overdrawing was made for private purposes, against the prohibition, either express or implied, in the partnership agreement, without the knowledge, consent, privity, or subse-

[1] Farnsworth v. Whitney, 74 Maine 370; Russell v. Grimes, 46 Mo. 410; McAuley v. Cooley, 45 Nebr. 582, 63 N. W. 871; Binney v. Delmar, 17 N. Y. S. 524, 43 N. Y. St. 533; Crockett v. Burleson, 60 W. Va. 252, 54 S. E. 341, 6 L. R. A. (N. S.) 263n.

[2] Adams v. Funk, 53 Ill. 219. Contra: Chase v. Garvin, 19 Maine 211.

[3] Morris v. Wood (Tenn.), 35 S. W. 1013 (1896).

[3a] 2 Ves. & B. 210.

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quent approbation of the other partners. That is all that is necessary to be proved; but, if that be shown, it is prima facie a fraudulent appropriation, within the rule.'" In the same case the court quotes from and approves Mr. T. Parsons' statement, as follows:[4] "The fraud may be constructive only, and any act would be so which violated the articles of agreement of the partners, or abstracted or appropriated property or funds by the act of one partner only, without the authority, consent or knowledge of the others." It may safely be stated that the principles laid down in the above cases and texts are very general, if not practically universal, both in the courts of England and the United States, and, further, that the rule is of ancient origin.[5]

§ 757. Partition and suits involving real estate.—One partner has no right to bring an action against his copartner for partition of partnership real estate, until the creditors have been paid and partnership accounts have been adjusted.[6] But there are a few cases which seem to hold a contrary rule,[7] and if real estate held by partners is not partnership property, they may have a partition.[8] The general rule holds that partners in dealing in real estate must wait until dissolution and settlement before bringing actions against each other on matters connected with firm business,[9] though if the association is for a single

[4] Parsons Partnership, p. 394.

[5] See Fuller v. Percival, 126 Mass. 381 (as to fraudulent conversion). See also Weirich v. Dodge, 101 Wis. 621, 77 N. W. 906; Ex parte Smith, 1 Glyn & J. 74.

[6] Hughes v. Devlin, 23 Cal. 501; Jackson v. Deese, 35 Ga. 84; Marseilles Land & Water Power Co. v. Aldrich, 86 Ill. 504; Patterson v. Blake, 12 Ind. 436; Pennybacker v. Leary, 65 Iowa 220, 21 N. W. 575; Thomas v. Scott, 3 Rob. (La.) 256; Chase v. Angell, 148 Mich. 1, 108 N. W. 1105, 118 Am. St. 568; Holmes v. McGee, 27 Mo. 597; Molineaux v. Raynolds, 54 N. J. Eq. 559, 35 Atl. 536; Eisner v. Eisner, 5 App. Div. 117, 38 N. Y. S. 671; Baird v. Baird's Heirs, 21 N. Car. 524, 31 Am. Dec. 399; Baldes v. Henniges, 7 Kulp. (Pa.) 143; Jones v. Smith, 31 S. Car. 527, 10 S. E. 340; Kruschke v. Stefan, 83 Wis. 373, 53 N. W. 679.

[7] Jackson v. Deese, 35 Ga. 84; Collins v. Dickinson, 2 N. Car. 240.

[8] Thompson v. Holden, 117 Mo. 118, 22 S. W. 905.

[9] Reddick v. White, 46 La. Ann. 1198, 15 So. 487; Springer v. Cabell, 10 Mo. 640.

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transaction, the rule is relaxed and assumpsit will lie between the partners.[10]

§ 758. Tort actions between partners.—Actions for damages will lie between partners for tortious wrongs inflicted by a partner to the person or property of copartner.[11] So damages may be recovered for wrongful destruction of firm property;[12] for detaining partnership property under a claim of ownership;[13] for conversion of a chattel by selling it in denial of the partnership interest;[14] or where a partner unfairly attempts to acquire gain at his copartner's expense.[15]

§ 759. Trespass, trover, and conversion.—The right of one copartner to sue another in trespass,[16] replevin,[17] or trover[18] has been denied. It is held that a partner can not maintain an action of trespass against copartners for conspiracy directed against and affecting the affairs of a partnership which has not been settled or adjusted.[19] It was said in one leading case:[20] "But if it be said that whether or not the goods were in fact sold by the partner Thomas Montjoy, was a question proper for the decision of the jury, and that as the instructions asked were not hypothecated on the opinion of the jury as to that fact, it was proper in the court to refuse the instructions, it is answered that if the goods were not sold, the defendant, Thomas

[10] Meason v. Kaine, 63 Pa. St. 335; Finlay v. Stewart, 56 Pa. St. 183; Brubaker v. Robinson, 3 Pen. & W. (Pa.) 295; McFadden v. Erwin, 2 Whart. (Pa.) 37.

[11] Haller v. Willamowicz, 23 Ark. 566; Newby v. Harrell, 99 N. Car. 149, 5 S. E. 284, 6 Am. St. 503; Reg. v. Mallinson, 16 Q. B. 367, 15 Jur. 746.

[12] Montjoy v. Holden, Litt. Sel. Cas. (Ky.) 447, 12 Am. Dec. 331; Taylor v. Brown, 17 U. C. C. P. 387.

[13] Rathwell v. Rathwell, 26 U. C. Q. B. 179.

[14] Weiss v. Weiss, 75 Misc. 644, 133 N. Y. S. 1021.

[15] White v. Jouett, 147 Ky. 197, 144 S. W. 55.

[16] Montjoy v. Holden, Litt. Sel. Cas. (Ky.) 447, 12 Am. Dec. 331.

[17] Buckley v. Carlisle, 2 Cal. 420; Azel v. Betz, 2 E. D. Smith (N. Y.) 188.

[18] Mason v. Tipton, 4 Cal. 276; Smith v. Book, 5 U. C. Q. B. (O. S.) 556.

[19] Lachmann v. Benson, 167 Ill. App. 85.

[20] Montjoy v. Holden, Litt. Sel. Cas. (Ky.) 447, 12 Am. Dec. 331.

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Montjoy, must, as partner, have held an equal interest in them with the plaintiff, Holden, and can not have been liable to the action of Holden for the taking of the goods. He might, perhaps, have been liable if the goods had been actually destroyed, but there is no evidence of any destruction, and it is well settled that unless the goods held in common be actually destroyed, an action of trespass or trover can not be maintained by one tenant in common, joint-tenant or partner, against another."[21] A New York case however allowed one partner to sue another in trover who sold all the partnership property wrongfully without the other partner's consent on the theory that such action lies between tenants in common, and that partners are tenants in common.[22] The rule that trover will lie between tenants in common is settled in New York, and some other American jurisdictions,[23] but the proposition that partners are tenants in common, does not seem to be based on a sound foundation.[24]

§ 760. Actions between partners after dissolution. — Where on retirement of a partner the debts of the old firm have been assumed by a new firm or by a partner in the old firm or the remaining partners, and there is a breach of the contract to pay for the retiring partner's share in the firm property, or of the agreement to save him from harm in connection with the firm's debts, such retiring partner may sue the other party or parties to the contract of assumption, or of purchase.[25] A

[21] 1 Chitty Pleading, 156. Buller's Nisi Prius 34, 35, 2 Saund. 47, f. g. note 1, Wat. Part. 148.

[22] Weiss v. Weiss, 133 N. Y. S. 1021.

[23] Wheeler v. Wheeler, 33 Maine 347; Delaney v. Root, 99 Mass. 546, 97 Am. Dec. 52; White v. Osborn, 21 Wend. (N. Y.) 72; Osborn v. Schenck, 83 N. Y. 201.

[24] See Ch. 11, §§ 291, 292, 293.

[25] Burney v. Boone, 32 Ala. 486; Meyer v. Parsons, 129 Cal. 653, 62 Pac. 216; Dickenson v. Moore, 117 Ga. 887, 45 S. E. 240; Tucker v. Murphey, 114 Ga. 662, 40 S. E. 836; McGilvery v. McGilvery, 23 Idaho 116, 128 Pac. 978; Teed v. Parsons, 100 Ill. App. 342 (revd. 202 Ill. 455, 66 N. E. 1044); Jackson v. Hart, 12 Ind. 605; Nichols v. Prince, 8 Allen (Mass.) 404; Scovill v. Kinsley, 13 Gray (Mass.) 5; Berridge v. Slawson, 94 Mich. 484, 54 N. W. 278; Gardiner v. Fargo, 58 Mich. 72, 24 N. W. 655; Osborn v. Osborn, 36 Mich. 48; McInnis v. Casualty Co., 113 Minn. 156, 129 N. W. 125, 388; McCarthy

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retiring partner who fails to perform or in any manner breaches the contract of dissolution may be sued by the other party to the contract.[26] Thus, where a partner sold his interest in a firm to a copartner, and agreed not to engage again in similar business, the copartner and a third person who purchased such interest were proper plaintiffs in an action for the breach of the contract not to engage in business.[27] If a bond has been given the retiring partner to secure him against the payment of firm debts, it has been held that in an action on such bond, the court should provide that he must satisfy firm debts from the money received.[28] Where a partnership sold its business and property to another partnership having a common member with the selling partnership, it was held that a cause of action for the payment of indebtedness of the selling partnership by the purchasing partnership was in the latter firm, and not in one of the partners, who was not a member of both firms, in the absence of dissolution of the purchasing partnership, or in case of equitable accounting, and that where a member of the selling firm collected debts which had been transferred to the purchasing firm, and appropriated the proceeds to his own use, the purchasing firm was the proper plaintiff.[29] Where defendant, a partner with the plaintiff in the grocery business, purchased secretly with others the premises on which the business was conducted, dissolved the firm, and ousted the plaintiff from the premises and started another grocery firm the plaintiff could maintain an action for damages

v. Donnelly, 90 Minn. 104, 95 N. W. 760; Meyer v. Shamp, 26 Nebr. 729, 42 N. W. 757; Huffman v. Huffman, 63 S. Car. 1, 40 S. E. 963; Allen v. Cooley, 53 S. Car. 414, 31 S. E. 634; Brazee v. Woods, 35 Tex. 302; Binyon v. Smith, 50 Tex. Civ. App. 398, 112 S. W. 138; Gaisell v. Johnston, 68 Wash. 470, 123 Pac. 783; Dyer v. Dyer, 138 Ga. 159, 74 S. E. 1030. Compare Frank v. Beswick, 44 U. C. Q. B. 1.

[26] Kelsey v. Hobby, 16 Pet. (U. S.) 269, 10 L. ed. 961; Lee v. Davis, 70 Ind. 464; Downs v. Woodson, 76 S. W. 152, 25 Ky. L. 566; Bank of British North America v. Delafield, 126 N. Y. 410, 27 N. E. 797 (affg. 12 N. Y. S. 440); Reddington v. Franey, 131 Wis. 518, 111 N. W. 725.

[27] DuBois v. Padgham, 18 Cal. App. 298, 123 Pac. 207.

[28] Wilson v. Stilwell, 9 Ohio St. 467, 75 Am. Dec. 477.

[29] Callaway v. Pearson, 139 Ga. 540, 77 S. E. 816.

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for the loss of the good will of the business.[30] Purchasers of a partner's interest may sue a former partner for money collected by him.[31] "If one partner having charge of the books and business of the firm, by making material, false and fraudulent representations to the effect that certain items of charge against others constituted debts owing to the firm, when in fact, some of said items had been collected by him, and others were false charges, induced the other partner to enter into a contract finally settling and dissolving the partnership, whereby the latter took over for value as his individual property all of said items of charge, the latter may, upon discovery of the fraud, sue the former at law for any damages occasioned by the deceit."[33]

§ 761. **Attachment and garnishment.**—Claims between partners for an uncertain balance due from one to the other do not carry the right to garnish or attach firm property at law, since in such cases an accounting in equity is necessary to ascertain the amount due,[34] but under some statutes such right is given.[35] Nor is there a right on claims arising out of partnership matters, to attach a partner's individual property.[36] But if a balance has been struck, an attachment has been allowed.[37]

[30] Donleavey v. Johnston, 24 Cal. App. 319, 141 Pac. 229.

[31] Semple v. Burke, 26 N. Dak. 200, 144 N. W. 103.

[33] Adams v. Funk, 53 Ill. 219; Farnsworth v. Whitney, 74 Maine 370. Compare Holyoke v. Mayo, 50 Maine 385; Russell v. Grimes, 46 Mo. 410; Binney v. Delmar, 17 N. Y. 524, 43 N. Y. St. 533; Crockett v. Burleson, 60 W. Va. 252, 54 S. E. 341, 6 L. R. A. (N. S.) 263. See also McAuley v. Cooley, 45 Nebr. 582, 63 N. W. 871.

[34] Newsonn v. Ritman, 98 Ala. 526, 12 So. 412; Ives v. Vanscoyoc, 81 Ill. 120; Levy v. Levy, 11 La. 577; Farwell v. Chambers, 62 Mich. 316, 28 N. W. 859. Compare Cox v. Russell, 44 Iowa 556; Birtwhistle v. Woodward, 95 Mo. 113, 7 S. W. 465; Treadwell v. Brown, 41 N. H. 12; Girard &c. Ins. Co. v. Field, 45 Pa. St. 129, 3 Grant Cas. 329. See also Burnham v. Hopkinson, 17 N. H. 259.

[35] Hansen v. Morris, 87 Iowa 303, 54 N. W. 223; Walsh v. Parr, 110 S. W. 300, 33 Ky. L. 242; Goble v. Howard, 12 Ohio St. 165; Bingham v. Keylor, 19 Wash. 555, 53 Pac. 729.

[36] Stone v. Boone, 24 Kans. 337; Bingham v. Keyler, 19 Wash. 555, 53 Pac. 729.

[37] Ryon v. Wynkoop, 148 Pa. St. 188, 23 Atl. 1002; Knerr v. Hoffman, 65 Pa. St. 126.

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§ 762. **Arrest of partner in civil action.**—It has been held that under a statute permitting an arrest in a civil action for fraud gives one partner the right to an order for the arrest of his copartner, in a case where an action at law by one partner against another, will lie.[38] The court said in one case, that as an action at law was maintainable, "If the facts bring the claim within the provisions of our statutes on arrest and bail, no reason occurs to us why the plaintiff should be deprived of this ancillary remedy. The statute[38a] provides that when a defendant has been guilty of fraud in contracting the debt or incurring the obligation for which action is brought, or for concealing or disposing of property, or to recover damages for fraud or deceit, an order for arrest may be issued; and it has been held[38b] that such order is proper when there has been fraud committed after contracting the debt, as by concealing property or other devices for defeating the creditor. Here is an allegation and ample evidence to sustain it, charging intentional fraud throughout the entire transaction on the part of the defendant, and the judge below has found that these charges are true; a fraudulent design in having the options drawn in the name of the defendant; a fraudulent effort and purpose in concealing the sale from the plaintiff; false and fraudulent statements in procuring from the plaintiff a receipt in full, etc. We must not be understood as holding that no right of arrest can ever exist where the partnership has terminated and the affairs are so complicated that, in order to a proper settlement, an action in the nature of a bill in equity for an account is required. We have only elaborated the position that the right of arrest may exist when an action of law would lie with a view of confining the decision to the points required by the facts of the case before us."[39] But in several other cases the right of a partner to have his copartner

[38] Madge v. Puig, 12 Hun (N. Y.) 15; Ledford v. Emerson, 140 N. Car. 288, 52 S. E. 641, 4 L. R. A. (N. S.) 130n, 6 Ann. Cas. 107 and note.

[38a] Code N. Car., § 291, 4.

[38b] Citing Powers v. Davenport, 101 N. Car. 286, 7 S. E. 747.

[39] Ledford v. Emerson, 140 N. Car. 288, 52 S. E. 641, 4 L. R. A. (N. S.) 130, 6 Ann. Cas. 107.

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arrested in an action involving partnership transactions, has been denied.[40]

§ 763. **Defenses.**—Among defenses which may be set up in actions between partners are, a contract subsequent to that sued on by which the property involved became partnership property;[41] satisfaction of the obligation;[42] settlement barring the action as by arbitration;[42a] division of partnership property;[43] failure of consideration;[44] fraud;[45] failure to perform a condition precedent.[46] But it has been held not a defense to an accounting between the parties that the original contract was illegal, as against public policy, such as blockade running or dealing with persons in rebellion, when the money has passed into other forms;[47] or where the partners were engaged in the unlawful sale of liquor;[48] or in a business in Mexico which was illegal there.[49] Other cases adhere to a contrary rule and have permitted a partner to set up the illegality of the contract in defense.[50]

[40] Soule v. Hayward, 1 Cal. 345; Hanna v. Auter, 4 Rob. (La.) 221; Cary v. Williams, 1 Duer (N. Y.) 667; Smith v. Small, 54 Barb. (N. Y.) 223.

[41] Pico v. Cuyas, 47 Cal. 180.

[42] Trink v. Ryan, 4 Ill. 322; Griffith v. Hill, 7 Blackf. (Ind.) 324; Fletcher v. Brown, 7 Humph. (Tenn.) 385.

[42a] Madison v. Henderson, 86 Ill. App. 113.

[43] Shields v. Fuller, 4 Wis. 102, 65 Am. Dec. 293.

[44] Durham v. Lathrop, 95 Ill. App. 429; Mullendore v. Scott, 45 Ind. 113; Coffin v. Mitchell, 34 Ind. 293; Rogers v. Rogers, 1 Hall (N. Y.) 434; Halliday v. Carnan, 6 Daly (N. Y.) 422; Welch v. Miller, 210 Pa. 204, 59 Atl. 1065; Lee v. Longbottom, 173 Pa. St. 408, 34 Atl. 436.

[45] Powell v. Graves, 9 La. Ann. 435.

[46] Hoile v. York, 27 Wis. 209.

[47] Brooks v. Martin, 69 U. S. 70, 17 L. ed. 732; Wann v. Kelley, 2 McCrary (U. S.) 628, 5 Fed. 584; Wallis v. Wheelock, 26 La. Ann. 246; Pfeuffer v. Maltby, 54 Tex. 454, 38 Am. Rep. 631; DeLeon v. Trevino, 49 Tex. 88, 30 Am. Rep. 101. Contra: Lane v. Thomas, 37 Tex. 157; Barrow v. Pike, 21 La. Ann. 14.

[48] McGunn v. Hanlin, 29 Mich. 476; Howe v. Jolly, 68 Miss. 323, 8 So. 513.

[49] Hutchinson v. Murray (Tex. Civ. App.), 169 S. W. 640.

[50] McMullen v. Hoffman, 174 U. S. 639, 43 L. ed. 1117, 19 Sup. Ct. 839. See ante, §§ 655, 656.

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§ 764. Set-off and counterclaim.—In an action at law between partners, where one partner is seeking to recover from the other on an individual obligation, a debt or liability owing by the plaintiff partner to the firm can not be set off against his claim on the defendant partner individually.[51] Nor can unadjusted partnership accounts or matters be set off in a suit between partners on individual obligations.[52] It was said in an early case on this question:[53] "The sole question is whether a debt due from Francis to Robert, Daniel and Richard Rand, and a debt due from Daniel Rand to Francis, are mutual debts. The inquiry carries its own answer on the face of it. The debts are in no sense mutual. In Palmer v. Green,[54] a joint and separate debt were adjudged not to be mutual debts, and that they could not be set off against each other; and that to authorize this proceeding, they must be necessarily due to and from the same persons in the same capacity. In this case, the debt due from one in-

[51] Chapin v. Streeter, 124 U. S. 360, 31 L. ed. 475, 8 Sup. Ct. 529; Houston v. Brown, 23 Ark. 333; Ingols v. Plimpton, 10 Colo. 535, 16 Pac. 155; Francis v. Rand, 7 Conn. 221; Greer v. Arlington Mills Mfg. Co., 1 Pennew. Del.) 581, 43 Atl. 609; West v. Kendrick, 46 Ga. 526; Taylor v. Hardin, 38 Ga. 577; International Bank v. Jones, 119 Ill. 407, 9 N. E. 885, 59 Am. Rep. 807; Hilliard v. Walker, 11 Ill. 644; Dameier v. Bayor, 68 Ill. App. 477 (affd. 167 Ill. 547, 47 N. E. 770); Thompson v. Lowe, 111 Ind. 272, 12 N. E. 476. See also Raymond v. Palmer, 41 La. Ann. 425, 6 So. 692, 17 Am. St. 398; Ashley v. Sholars, 22 La. Ann. 442; Wiggin v. Goodwin, 63 Maine 389; Fessenden v. Forest Paper Co., 63 Maine 175; Mitchell v. Sellman, 5 Md. 376; Lesure v. Norris, 65 Mass. (11 Cush.) 328; Reed v. Whitney, 7 Gray (Mass.) 533; Stewart v. Terwilliger, 177 Mich. 313, 143 N. W. 17, Ann. Cas. 1915 C, 808; Sturges v. Swift, 32 Miss. 239; Pool v. Delaney, 11 Mo. 570; Finney v. Turner, 10 Mo. 207; Reim v. Bissinger, 75 N. J. L. 289, 68 Atl. 88; Compton v. Green, 9 How. Pr. (N. Y.) 228; McDowell v. Tyson, 14 Serg. & R. (Pa.) 300; Walker v. Eyth, 25 Pa. St. 216; Roberts v. Fitler, 13 Pa. St. 265; Flint v. Tillman, 2 Heisk. (Tenn.) 202; Wise v. Ferguson (Tex. Civ. App.), 138 S. W. 816; Edmonson v. Thomasson, 112 Va. 326, 71 S. E. 536; Gordon v. Ellis, 2 C. B. 821, 52 E. C. L. 821.

[52] Willis v. Barron, 143 Mo. 450, 45 S. W. 289, 65 Am. St. 673; Leabo v. Renshaw, 61 Mo. 292; Benson v. Tilton, 54 N. H. 174; Ordiorne v. Woodman, 39 N. H. 541; Ives v. Miller, 19 Barb. (N. Y.) 196; Worley v. Smith, 26 Tex. Civ. App. 270, 63 S. W. 903.

[53] Francis v. Rand, 7 Conn. 221.

[54] 6 Conn. 14.

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dividual to another individual is requested to be set off against a debt due from an individual to a mercantile company. This can not be done." An obligation owing to the defendant as an individual may be set off in an action between partners;[55] or a payment of a partnership debt;[56] or an agreed balance on settlement.[57] After dissolution an unliquidated demand growing out of unsettled accounts may be pleaded as a set-off in an action between former partners;[58] and a partner who purchases the other partner's interest, may in an action on the purchase-money note, recoup by a claim for damages for impairing an uncompleted contract of the firm.[59] But no claim can be urged as a set-off in an action at law which would require a court of law to enter into a partnership accounting.[60]

§ 765. Demand and laches.—Where one partner sues his copartner for conversion to his own use of money collected which upon dissolution he agreed should be the property of the partner suing, no demand before action is necessary.[61] But, generally, on a claim for money received by virtue of the partnership relation which constitutes each partner an agent of the others, there must be a demand before suit.[62] And if one partner is to pay the other money before he can obtain certain rights, such as possession upon purchase of a partner's interest, there must be a tender before action.[63] Unreasonable delay in bringing an action may be such laches as to bar it.[64]

[55] Mullendore v. Scott, 45 Ind. 113; Cilley v. Van Patten, 58 Mich. 404, 25 N. W. 326; Kinney v. Robison, 52 Mich. 389, 18 N. W. 120.

[56] Farwell v. Tyler, 5 Iowa 535.

[57] Dana v. Barrett, 3 J. J. Marsh. (Ky.) 6; Merrill v. Green, 55 N. Y. 270 (affg. 66 Barb. 582).

[58] Hendry v. Hendry, 32 Ind. 349; Irish v. Snelson, 16 Ind. 365.

[59] Durham v. Lathrop, 95 Ill. App. 429.

[60] George v. Pfeil, 158 Ill. App. 261.

[61] Douthit v. Douthit, 133 Ind. 26, 32 N. E. 715; Robinson v. Williams, 8 Metc. (Mass.) 454.

[62] Allen v. Davis, 13 Ark. 28; Krutz v. Craig, 53 Ind. 561; Dakin v. Graves, 48 N. H. 45.

[63] Phillips v. Crownfield, 124 Md. App. 443, 92 Atl. 1030. See also as to tender Ramsey v. Bird (Tex. Civ. App.), 147 S. W. 671.

[64] Wood v. Fox, 1 A. K. Marsh. (Ky.) 451; Roby v. Colehour, 135 Ill. 300, 25 N. E. 777 (affd. 146 U. S. 153, 36 L. ed. 922, 13 Sup. Ct. 47); Wells v. Carpenter, 65 Ill. 447; Stuart v. Harmon, 24 Ky. L. 1829,

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§ 766. Venue and time to sue.—An action between partners is governed as to venue by the rules applicable to the bringing of personal actions in the state of the forum, even though partnership realty is involved.[65] The general rule is that the right of a partner to sue a copartner on a claim based on a partnership transaction does not accrue until dissolution of the partnership.[66] The statutes of the various states should be examined in order to ascertain when such an action becomes barred by limitation.[67] Where a partner after dissolution buys a claim against the firm to set off against a claim of his copartner, his right of action becomes barred when that of the assignor would have been barred.[68]

§ 767. Parties and trial.—In actions between partners on individual matters, the partner bringing the action sues as plaintiff, making the partner or partners whom he seeks to hold defendants.[69] Thus in such cases as may be commenced by one partner against another, as, for example, an action for breach of a contract of partnership, where the business has not com-

72 S. W. 365; Compton v. Thorn, 90 Va. 653, 19 S. E. 451; Haggart v. Allan, 2 Grant Ch. 407. See Power v. Rees, 189 Pa. St. 496, 42 Atl. 26.

[65] Lyman v. Lyman, Fed. Cas. No. 8628, 2 Paine 11; Jones v. Fletcher, 42 Ark. 422; Black v. Black, 27 Ga. 40; Godfrey v. White, 43 Mich. 171, 5 N. W. 243; Wells v. Collins, 11 Lea (Tenn.) 213.

[66] Cole v. Fowler, 68 Conn. 450, 36 Atl. 807; Harris v. Matthews, 107 Ga. 46, 32 S. E. 903; Burbank v. Oglesby, 35 La. Ann. 1201; Baker v. Brown, 151 N. Car. 12, 65 S. E. 520; Smith v. Brown, 44 W. Va. 342, 30 S. E. 160; Storm v. Cumberland, 18 Grant Ch. (U. C.) 245.

[67] Patterson v. Brown, 22 Ky. (6 T. B. Mon.) 10; Parker's Succession, 17 La. Ann. 28; Forward v. Forward, 6 Allen (Mass.) 494; Clute v. Potter, 37 Barb. (N. Y.) 199; Logan v. Dixon, 73 Wis. 533, 41 N. W. 713.

[68] Ahl v. Ahl, 186 Pa. St. 99, 40 Atl. 405.

[69] Tillis v. Folmar, 145 Ala. 176, 39 So. 913, 117 Am. St. 31; Robinson v. Bullock, 58 Ala. 618; Penn v. Stone, 10 Ala. 209; Bull v. Coe, 77 Cal. 54, 18 Pac. 808, 11 Am. St. 235; Way v. Fravel, 61 Ind. 162; Thomas v. Pyke, 4 Bibb. (Ky.) 418; Causten v. Burke, 2 Harr. & G. (Md.) 295, 18 Am. Dec. 297; Roache v. Pendergast, 3 Harr. & J. (Md.) 33; Dunham v. Gillis, 8 Mass. 462; Berkey v. Judd, 22 Minn. 287; Scott v. Bryan, 96 N. Car. 289, 3 S. E. 235; Masters v. Freeman, 17 Ohio

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menced and no accounts are involved,[70] or where there has been a settlement and an agreed balance found,[71] the usual rule applies, that all parties interested in the relief asked must join as plaintiff, or, if some refuse to so join, then they must be brought in as parties defendant. In accounting, or other equitable actions between partners, the same rules must in general be applied. In an action in equity involving an accounting as to partnership affairs, all the partners and all other persons having an interest in the property or whose rights are necessarily affected by the controversy, such as assignees, administrators or other successors of a partner, must be made parties, either plaintiff or defendant.[72] A partner who sues another at law upon a claim has the burden of showing that his claim falls within the exceptions to the general rule that no action at law will lie between partners.[73] The rules of pleading and evidence in actions between partners, so far as they differ from the ordinary rules, will be considered in the chapters on pleading and evidence. At the trial it is the function of the court to construe the pleadings and written agreements;[74] and if the facts are undisputed, to determine as a matter of law whether a partnership exists.[75] It is the province of the jury to ascertain the facts where there is con-

St. 323; Manufacturing &c. Co. v. Schoolly, Tapp (Ohio) 271; Kerr v. Hawthorne, 4 Yeates (Pa.) 170.

[70] Vance v. Blair, 18 Ohio 532, 51 Am. Dec. 467.

[71] Thompson v. Smith, 82 Iowa 598, 48 N. W. 988.

[72] Edgell v. Felder, 84 Fed. 69, 28 C. C. A. 382; Fortune v. Brazier, 10 Ala. 791; Duck v. Abbott, 24 Ind. 349; Dixon v. Dixon, 19 Iowa 512; Riarl v. Wilhelm, 3 Gill (Md.) 356; Grahame v. Harris, 5 Gill & J. (Md.) 489; Wiggin v. Cumings, 8 Allen (Mass.) 353; Montague v. Lobdell, 11 Cush. (Mass.) 111; Burley v. Harris, 8 N. H. 233, 29 Am. Dec. 650; Young v. Huber, 29 Grant Ch. (U. C.) 49; Bates Partnership, § 930 et seq.

[73] Nevills v. Moore Min. Co., 135 Cal. 561, 67 Pac. 1054; Wilt v. Bird, 7 Blackf. (Ind.) 258; Boardman v. Close, 44 Iowa 428; Murdock v. Martin, 12 Sm. & M. (Miss.) 660; Wright v. Cobleigh, 21 N. H. 339; Cameron v. Bickford, 11 Ont. App. 52.

[74] Everitt v. Chapman, 6 Conn. 347; Wadley v. Jones, 55 Ga. 329; Dorwart v. Ball, 71 Nebr. 173, 98 N. W. 652; Whitaker v. Bledsoe, 34 Tex. 401.

[75] Robinson v. Green, 5 Harr. (Del.) 115; Gilpin v. Temple, 4 Harr. (Del.) 190; Beecham v. Dodd,

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flicting evidence, or where differing inferences may be drawn from the evidence.[76]

§ 768. Damages for breach of contract of partnership.—A partner who wrongfully brings about the dissolution of a partnership is liable to his copartners for damages suffered thereby.[76a] Damages may be allowed for breach of a contract to enter into a partnership, even if at the time of the breach the partnership had not been entered into, and the measure of damages is the same as if the business has once been entered into.[77] It may be that the profitable employment of a partner's time after exclusion from the business should be considered for the reduction of damages.[78] In such case it seems exemplary damages should not be allowed.[79] Where a partner fails to make an agreed contribution to partnership funds of a going concern the measure of damages is interest on the money which was not contributed.[80]

3 Harr. (Del.) 485; Bailey v. Ferguson, 39 Ill. App. 91; Kingsbury v. Tharp, 61 Mich. 216, 28 N. W. 74; Evans v. Warner, 20 App. Div. 230, 47 N. Y. S. 16; Covington v. Leak, 88 N. Car. 133; Terrill v. Richards, 1 Nott. & M. (S. Car.) 20.

[76] Beecham v. Dodd, 3 Har. (Del.) 485; Branch v. Cooper, 82 Ga. 512, 9 S. E. 1130; Snowden v. Cunningham, 59 Fla. 604, 51 So. 543; Hartzell v. Murray, 127 Ill. App. 608; Blain v. Desrosiers, 39 Ill. App. 50; Carl v. Knott, 16 Iowa 379; Barger v. Collins, 2 Gill & J. (Md.) 410; Adamson v. Guild, 177 Mass. 331, 58 N. E. 1081; Dart v. Laimbeer, 107 N. Y. 664, 14 N. E. 291, Silv. Ct. App. 533; Cobb v. Martin, 32 Okla. 588, 123 Pac. 432; Yoke v. Barnet, 3 Watts & S. (Pa.) 81; Roop v. Roop, 3 Phila. (Pa.) 364.

[76a] Howell v. Harvey, 5 Ark. 270, 39 Am. Dec. 376; Corcoran v. Sumption, 79 Minn. 108, 81 N. W. 761, 79 Am. St. 428. Generally the measure of damages in an action for the breach of a partnership contract is the value of the contract broken, separate and independent of any other former contract. Addams v. Tutton, 39 Pa. St. 447. See also Jones v. Morehead, 3 B. Mon. (Ky.) 377; Jewett v. Brooks, 134 Mass. 505.

[77] Goldsmith v. Sachs, 17 Fed. 726, 8 Sawy. 110; Rockwell Stock &c. Co. v. Castroni, 6 Colo. App. 521, 42 Pac. 180; Hoy v. Gronoble, 34 Pa. St. 9, 75 Am. Dec. 628; Hill v. Palmer, 56 Wis. 123, 14 N. W. 20, 43 Am. Rep. 703; Webster v. Beau, 77 Wash. 444, 137 Pac. 1013, 51 L. R. A. (N. S.) 81n.

[78] Bagley v. Smith, 10 N. Y. 489, 61 Am. Dec. 756, 19 How. Pr. 1, Seld. Notes 109.

[79] Hoy v. Gronoble, 34 Pa. St. 9, 75 Am. Dec. 628.

[80] Krapp v. Aderholdt, 42 Kans.

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However, if the defendant agrees to furnish all the capital, and his failure to do so breaks up the business, the measure of the damages is the same as where a partner is excluded from the business or there is a refusal to go on with it, and is, generally speaking, the loss of profits.[81] The measure of damages for breach of a covenant to continue the partnership for a fixed period as well as in all other cases of broken covenant depends on the extent of the injury.[82] In an action for damages for wrongful dissolution it is competent in estimating the value of the contract as a measure of damages to show the actual condition and situation of the business and assets of the firm, together with proof as to the actual results accomplished in the business before the breach.[83] Damages actually sustained may be recovered from a partner who canceled firm contracts before his withdrawal so as to obtain them for his individual benefit.[84] Two physicians agreed to form a partnership; the articles were to the effect that they should divide the receipts should the partnership continue, but, if one withdrew from practice, the other should pay him a certain sum. Before anything was done under this contract, one party declined to proceed with the business, and it was held that this act did not prevent the other from recovering the sum agreed on as compensation for withdrawal from practice, he having elected so to do.[85] In a case where an action was brought for a failure of one partner to comply with an agreement made by him as a condition precedent to the formation of the partnership, the court said:[86] "When one violates his

247, 21 Pac. 1063; Hartman v. Woehr, 18 N. J. Eq. 383; Delp v. Edlis, 190 Pa. St. 25, 42 Atl. 462.

[81] Dart v. Laimbeer, 107 N. Y. 664, 14 N. E. 291, Silv. Ct. App. 533; Hunter v. Land, 81 Pa. St. 296; Gale v. Leckie, 2 Stark. 107, 19 Rev. Rep. 692.

[82] Bagley v. Smith, 10 N. Y. 489, 19 How. Pr. 1, Seld. Notes (N. Y.) 109, 61 Am. Dec. 756. See also Wadsworth v. Manning, 4 Md. 59; Sneed v. Deal, 53 Ark. 152, 13 S. W. 703; White v. Rodeman, 44 App. Div. 503, 60 N. Y. S. 971.

[83] Reiter v. Morton, 96 Pa. St. 229.

[84] Axton v. Kentucky Bottlers' Supply Co., 159 Ky. 51, 166 S. W. 776.

[85] Frothingham v. Seymour, 121 Mass. 409.

[86] Owen v. Meroney, 136 N. Car. 475, 48 S. E. 821, 103 Am. St. 952, 1 Ann. Cas. 834.

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contract he is liable for such damages as are caused by its breach, or such as being incidental to the act of omission or commission, and a natural consequence thereof may reasonably be presumed to have been in the contemplation of the parties when the contract was made.[87] Where two parties have made a contract which one of them has broken, the damages which the other party ought to receive in respect of such breach of contract should be such as may fairly and reasonably be considered, either arising naturally, that is, according to the usual course of things, from such breach of contract itself, or such as may reasonably be supposed to have been in the contemplation of both parties at the time they made the contract, as the probable result of the breach of it."[88] "The application of these principles to the facts of this case, as they may prove to be, is a matter for consideration upon the trial."

§ 769. **Profits as the measure of damage.**—There is no doubt that where a partner who carries on the business excludes another partner from the business, the latter is entitled in equity to an accounting for profits.[89] Where the term has expired or the excluding partner has put an end to the business the excluded partner has a right in an action at law to recover as damages his share of the profits.[90] The right of a partner to an account of profits in equity when wrongfully excluded from the business

[87] Citing Spencer v. Hamilton, 113 N. Car. 49, 118 S. E. 167, 37 Am. St. 611.

[88] Citing Herring v. Armwood, 130 N. Car. 180, 41 S. E. 96, 57 L. R. A. 958.

[89] Ambler v. Whipple, 20 Wall. (U. S.) 546, 22 L. ed. 403; Karrick v. Hannaman, 168 U. S. 328, 42 L. ed. 484, 18 Sup. Ct. 135; Pearce v. Ham, 113 (U. S.) 585, 28 L. ed. 1067, 5 Sup. Ct. 676; Freeman v. Freeman, 136 Mass. 260; Beller v. Murphy, 139 Mo. App. 663, 123 S. W. 1029; Hartman v. Woehr, 18 N. J. Eq. 383; Holmes v. Gilman, 138 N. Y. 369, 34 N. E. 205, 20 L. R. A. 566, 34 Am. St. 463.

[90] Pearce v. Ham, 113 (U. S.) 585, 28 L. ed. 1067, 5 Sup. Ct. 676; Karrick v. Hannaman, 16 U. S. 328, 42 L. ed. 484, 18 Sup. Ct. 135; Hartman v. Woehr, 18 N. J. Eq. 383; Bagley v. Smith, 10 N. Y. 489, Seld Notes 109, 19 How. Pr. 1, 61 Am Dec. 756; Canfield v. Johnson, 144 Pa. St. 61, 22 Atl. 974; Clarkson v Whitaker, 12 Tex. Civ. App. 483, 33 S. W. 1032.

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by his copartner does not exclude his right to sue at law and recover profits as damages. As said in a leading case:[91] "When she (the defendant partner) assumed the right to take possession for herself, and to carry on the business with the partnership property, Harding had a clear right to call her to account for his share in all of the joint property, and at his election to require her to account for the profits, by way of damages or otherwise, which he had been prevented from making by his wrongful exclusion from the business. Neither is the remedy in equity for a breach of a partnership agreement exclusive. There may be at law a recovery of all the damages which result, including damages for profits prevented by a wrongful dissolution. Thus, if one member assumes to dissolve a partnership before the end of the term, the other may bring an action for damages for the breach, and recover not only his interest, but also his share of the profits, which might have been made during the term. He need not wait until the expiration of the period, and need not go into equity for an accounting, but may at law show the probable profits which he has been deprived of." In many, probably in most cases, the right to recover prospective profits has been allowed, where such profits are not remote, speculative, or legally uncertain.[92] "The object of commercial partnerships is profits. This is the motive upon which men enter into the relation. The only legitimate beneficial consequence of continuing a partnership is the making of profits. The most direct and legitimate injurious consequence which can follow upon an unauthorized dissolution of a partnership is the loss of profits. Unless that loss can be made up to the injured party,

[91] Zimmerman v. Harding, 227 U. S. 489, 57 L. ed. 608.

[92] Ramsay v. Meade, 37 Colo. 465, 86 Pac. 1018; Maguire v. Kiesel, 86 Conn. 453, 85 Atl. 689; Tygart v. Albritton, 5 Ga. App. 412, 63 S. E. 521; Rule v. McGregor, 117 Iowa 419, 90 N. W. 811; Brown v. Hadley, 43 Kans. 267, 23 Pac. 492; Winslow v. Lane, 63 Maine 161; Dart v. Laimbeer, 107 N. Y. 664, 14 N. E. 291, Silvernail Ct. App. 533; Crittenden v. Johnston, 7 App. Div. 258, 40 N. Y. S. 87; Hunter v. Land, 81 Pa. St. 296; Hoy v. Gronoble, 34 Pa. St. 9, 75 Am. Dec. 628; Treat v. Hiles, 81 Wis. 280, 50 N. W. 896; Gale v. Leckie, 2 Stark. 107, 19 Rev. Rep. 692.

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it is idle to say that any obligation is imposed by a contract to continue a partnership for a fixed period. The loss of profits is one of the common grounds, and the amount of profits lost one of the common measures, of the damages to be given upon a breach of contract."[93] And the amount of probable profits if there had been no dissolution has been held the measure of damages.[94] It was said in one case as to the measure of damages for the repudiation of an agreement to share as partners in the purchase of real estate:[95] "The measure of damages in the present case is therefore reasonable compensation for the loss which the plaintiff suffered in being wrongfully deprived of the benefit of the agreement. That which it provided for was a sharing of anticipated profits. Such profits were, therefore, within the contemplation of the parties. * * * The measure of the loss must be found in the profits which under the agreement the plaintiff would have been entitled to receive. * * * If the compensation is to be adequate, as the law endeavors as best it can, to make it, prospective as well as past profits must be taken into account in so far as the former are established with the requisite degree of certainty in respect to both connection and amount. * * * The question which arises in such cases relates not so much to the legal right of recovery as to the sufficiency of proof. There will be questions as to the proximate or remote character of the connection between the claimed profits and the alleged breach, and as to the certainty of the proof as to the amount. The requirement of the law, however, is not that prospective profits, in order to furnish a foundation for recovery, must be established with absolute certainty. It is sufficient that it be shown that they are, in the ordinary course of events, reasonably to be expected. * * * It follows that the court in the situation before it was entitled to discover what the period prior to the trial had revealed in the way of gain, for the double purpose of determin-

[93] Bagley v. Smith, 10 N. Y. (6 Selden) 489, 19 How. Pr. 1, 61 Am. Dec. 756.

[94] Ramsay v. Meade, 37 Colo. 465, 86 Pac. 1018.

[95] Maguire v. Kiesel, 86 Conn. 453, 85 Atl. 689.

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ing what profits, if any, had accrued, to enter directly into its award, if the conditions seemed to justify it, and to draw therefrom, in connection with the other pertinent facts, such reasonable inferences as it might as to additional future profits. Evidence of past profits is admissible upon an inquiry as to prospective, but not, of course, conclusive." But if there is no probability of any profits resulting from the business, it seems only nominal damages shall be awarded.[96] Some decisions have held that prospective profits are too speculative to be allowed as damages in cases of the character under consideration.[97] If profits are in fact speculative, resting on conjecture, it has been held they will not be allowed.[98] And this rule has been applied in an action for damages for breach of a contract to establish a fur-trade in a distant and sparsely settled portion of Alaska.[99] It has also been held that the measure of damages is the value of the partnership to a partner at the time of the wrongful dissolution and is not the share of the partner in the profits which the remaining partner made on thereafter carrying on the business.[1]

§ 770. Other measures of damage.—Several cases have refused to allow damages for contract relations or professional practice given up in order to enter into a partnership.[2] It has also been held that the value of an appointment relinquished by a partner in order to enter the partnership, is an element of damages.[3] In some of the cases which do not allow recovery for the loss of prospective profits, the value of time lost is considered

[96] Jones v. Morehead, 3 B. Mon. (Ky.) 377; Van Ness v. Fisher, 5 Lans. (N. Y.) 236; Sandius v. Mustacchi, 153 App. Div. 810.

[97] Rhodes v. Baird, 16 Ohio St. 573; Van Ness v. Fisher, 5 Lans. (N. Y.) 236; Couch v. Parker, 1 Tex. Civ. App. Cas. 192, § 435.

[98] Havemeyer v. Havemeyer, 13 Jones & S. (N. Y.) 464.

[99] Webster v. Beau, 77 Wash. 444, 137 Pac. 1013, 51 L. R. A. (N. S.) 81n. See Reiter v. Morton, 96 Pa. St. 229; Shropshire v. Adams, 40 Tex. Civ. App. 339, 89 S. W. 448.

[1] McCollum v. Carlucci, 206 Pa. 312, 55 Atl. 979, 98 Am. St. 780. See also Corcoran v. Sumption, 79 Minn. 108, 81 N. W. 761, 79 Am. St. 428; Van Ness v. Fisher, 5 Lans. (N. Y.) 236.

[2] Williams v. Barton, 13 La. 404; Addams v. Tutton, 39 Pa. St. 447.

[3] Macneill v. Reid, 2 M. & Scott 89, 9 Bing. 68, 1 L. J. C. P. 162. And see McNeill v. Reid, 9 Bing. 68.

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a substitute.[4] Some cases are inclined to a contrary holding.[5] Expenses incurred in performing his part of the breached agreement are usually allowed a plaintiff in cases where profits are not taken as an element of damages.[6] In some cases the value of services actually rendered the firm has been allowed.[7] If a partner was induced by fraud to furnish funds for a partnership business, by one who did not use the money in the interest of said business, he should recover the amount paid.[8] A partner may often recover his money advanced for the purposes of carrying out the contract.[9]

§ 771. Damages for breach of contract to pay firm debts or not to engage in business.—The damages recoverable for a breach of contract by which one partner agreed to pay certain debts of the firm on a dissolution would be the amount of the debts provided for in the contract.[10] These damages are recoverable on the failure of the partner to pay the debts as agreed, and this, though the other partner has paid nothing on the debts.[11] "Where there is an affirmative contract to do or to perform a certain act, or pay a certain sum of money, or a certain indebtedness, an action may be maintained, although the plaintiff has performed no act, or paid no part of the indebtedness, or sustained no actual damage, and the measure of his recovery is the

[4] Webster v. Beau, 77 Wash. 444, 137 Pac. 1013, 51 L. R. A. (N. S.) 81n; Rogers v. Bemus, 69 Pa. St. 432; Johnson v. Arnold, 2 Cush. (Mass.) 46; Hunt v. Reilly, 50 Tex. 99.

[5] Rockwell Stock &c. Co. v. Castroni, 6 Colo. App. 521.

[6] United States v. Behan, 110 U. S. 338, 28 L. ed. 168, 4 Sup. Ct. 81, 19 Ct. Cl. 710; Johnson v. Arnold, 2 Cush. (Mass.) 46; Webster v. Beau, 77 Wash. 444, 137 Pac. 1013, 51 L. R. A. (N. S.) 81n; Woodbury v. Jones, 44 N. H. 206; Kiralfy v. Macauley, 17 Ohio Wkly. L. Bulletin 331; Hunt v. Reilly, 50 Tex. 99; Gale v. Leckie, 2 Stark. 107, 19 Rev. Rep, 692.

[7] Hagenaers v. Herbst, 30 App. Div. 546, 52 N. Y. S. 360; Jennings v. Beale, 146 Pa. St. 125, 23 Atl. 225; Ball v. Britton, 58 Tex. 57. See White v. Rodemann, 44 App. Div. 503, 60 N. Y. S. 971.

[8] Crosby v. McDermitt, 7 Cal. 146; Child v. Swain, 69 Ind. 230; Hale v. Wilson, 112 Mass. 444.

[9] Corcoran v. Sumption, 79 Minn. 108, 79 Am. St. 428; Kerrigan v. Kelly, 17 Mo. 275; Nelson v. Hatch, 70 App. Div. 206, 75 N. Y. S. 389 (affd. 174 N. Y. 546, 67 N. E. 1085).

[10] Gillen v. Peters, 39 Kans. 489, 18 Pac. 613.

[11] Gage v. Lewis, 68 Ill. 604; Smith v. Riddell, 87 Ill. 165; Bacon v. Mar-

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value of the act to be done or the payment to be made."[11a] In one case where a partner after dissolution of the firm organized a firm with other parties and this firm contracted with the former partner in the dissolved firm to pay the debts of the old firm and to save such partner harmless from any cost, trouble or liability on account of the debts of the old firm, it was held that such partner on failure of the new firm to pay the debts within a reasonable time could recover the amount of the debts unpaid at the commencement of the action, with interest.[12] On the breach of a contract by a retiring partner not to again engage in the same business in the same locality, it has been held that the remaining partner may recover in one action all damages sustained by him, and this will include the damages past, present and future.[13]

§ 772. **Judgment and execution.**—The judgment in a partnership action must be determined by the pleadings and proof.[14] Thus, the limit of relief in a suit between partners as to a lease in one partner's name necessary for the business, is to decree it a partnership asset.[15] The fact that the partner had a good defense which he did not interpose, makes the judgment no less binding.[16] Where a partner enforces an execution against his copartner's interest in firm property, he must act with abso-

shall, 37 Iowa 581; Stout v. Folger, 34 Iowa 71, 11 Am. Rep. 138; Crofoot v. Moore, 4 Vt. 204. See also Lathrop v. Atwood, 21 Conn. 117.

[11a] Gillen v. Peters, 39 Kans. 489, 18 Pac. 613.

[12] Lathrop v. Atwood, 21 Conn. 117. See also Nelson v. Ravens, 3 Ill. App. 565; Weddle v. Stone, 12 Ind. 625.

[13] Downs v. Woodson, 25 Ky. L. 566, 76 S. W. 152. See also Davis v. Brown, 98 Ky. 475, 17 Ky. L. 1428, 32 S. W. 614, 36 S. W. 534.

[14] Whitesides v. Collier, 7 Dana (Ky.) 283; Brinley v. Kupfer, 6 Pick. (Mass.) 179; Cheeseman v. Sturges, 9 Bosw. (N. Y.) 246; Bigelow v. Powers, 20 Ont. L. R. 559.

[15] Dikis v. Likis, 187 Ala. 218, 65 So. 398.

[16] Johnson-Maakestad v. Johnson, 44 Ill. App. 593; Kunneke v. Mapel, 60 Ohio St. 1, 53 N. E. 259; Logan v. Dixon, 73 Wis. 533, 41 N. W. 713. See also Taylor v. Watts, 20 S. W. 388, 14 Ky. L. 451; Bowman v. O'Reilly, 31 Miss. 261.

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lute fairness if he buys in such interest.[17] And he takes such interest subject to the rights of partnership creditors.[18] Ordinarily, costs in a partnership action should be paid out of partnership property.[18a]

§ 773. **Equitable actions—In general.**—It has been seen that the remedy for most differences between partners is in equity, and the most important of these remedies is accounting and dissolution. Equitable actions are the rule between partners, and the legal actions herein treated are but the exceptions to the general rule. Among the equitable actions which may be mentioned in addition to accounting and which are treated herein are specific performance, injunctions, receiverships, rescission or reformation of contract, and the equitable application of assets. It is said that there are three general rules applied in all cases where equitable relief is sought by one partner against another: "Not to interfere except with a view to dissolve the partnership; not to interfere in matters of internal regulation; not to interfere at the instance of persons who have been guilty of laches."[19] Of course, there is no right to equitable relief where there is an adequate remedy at law, but, as we have seen, there are few matters arising between partners to which legal relief is adequate.[20] The three rules previously mentioned have become somewhat relaxed. However, though courts will not order a disso-

[17] Perrens v. Johnson, 3 Jur. (N. S.) 975, 3 Smale & G. 419; Smith v. Harrison, 3 Jur. (N. S.) 287.

[18] Priestly v. Bisland, 9 Rob. (La.) 425.

[18a] Clark v. Wilson, 23 Manitoba 10.

[19] Gilmore Partnership, § 162, p. 492.

[20] Spear v. Newell, 2 Paine (U. S.) 267, Fed. Cas. No. 13224; Haynes v. Short, 88 Ala. 562, 7 So. 157; Fogg v. Johnston, 27 Ala. 432, 62 Am. Dec. 771; McGown v. Sprague, 23 Ala. 524; Niles v. Williams, 24 Conn. 279; Hargis v. Campbell, 14 Fla. 27; Neel v. Morris, 73 Ga. 406; Epping v. Aiken, 71 Ga. 682; Goodson v. Cooley, 19 Ga. 599; Church v. First Nat. Bank, 87 Ill. 68; Hopkins v. Watt, 13 Ill. 298; Bracken v. Kennedy, 4 Ill. 558; Martin v. Stubbings, 20 Ill. App. 381; Waggoner v. Minter, 7 J. J. Marsh. (Ky.) 173; Woodward v. Cowing, 41 Maine 9, 66 Am. Dec. 211; Reed v. Johnson, 24 Maine 322; Chase v. Garvin, 19 Maine 211; Miller v. Lord, 11 Pick. (Mass.) 11; Stevens v. Yeatman, 19 Md. 480; Learned v. Ayers, 41 Mich. 677, 3 N. W. 178; Matter of Elder, 39 Mich. 474; Wheeler v. Arnold, 30 Mich.

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lution where one partner would receive an improper and unfair advantage, and may sometimes interfere to prevent a wrong when they would not formerly, they will not undertake the management of a going partnership.[21] A court of equity will not interfere where partners merely fail to agree as to questions of management, and generally will leave the parties to work out such problems themselves, unless some partners are guilty of illegal acts or breach of trust.[22] Nor will the courts interfere where there has not been reasonable vigilance in pressing a claim for equitable relief.[23] It has been held that in an action by one partner against a nonresident copartner, jurisdiction to determine the plaintiff's interest in partnership real estate, or other partnership property, may be acquired by constructive service.[24]

304; Cobb v. Cole, 44 Minn. 278, 46 N. W. 364; Lesley v. Rosson, 39 Miss. 368, 77 Am. Dec. 679; Wright v. Radcliffe, 61 Mo. App. 257; Converse v. Hobbs, 64 N. H. 42, 5 Atl. 832; Seighortner v. Weissenborn, 20 N. J. Eq. 172; Blackwell v. Rankin, 7 N. J. Eq. 152; Wilcox v. Pratt, 125 N. Y. 688, 25 N. E. 1091; Gridley v. Dole, 4 N. Y. 486; Burnside v. Savier, 6 Ore. 154; Andriessen's Appeal, In re, 123 Pa. St. 303, 16 Atl. 840; Bauer's Appeal, 5 W. N. C. (Pa.) 485, 2 W. N. C. (Pa.) 242; Tindel v. Park, 154 Pa. St. 36, 26 Atl. 300; Christy's Appeal, 92 Pa. St. 157; Spear v. Newell, 13 Vt. 288; Tillar v. Cook, 77 Va. 477; Stein v. Benedict, 83 Wis. 603, 53 N. W. 891.

[21] Fairthorne v. Weston, 3 Hare 387, 13 L. J. Ch. 263; Hogan v. Walsh, 122 Ga. 283, 50 S. E. 84; Bond v. May, 38 Ind. App. 396, 78 N. E. 260; Davis v. Davis, 60 Miss. 615; Lord v. Hull, 178 N. Y. 9, 70 N. E. 69, 102 Am. St. 484; Traphagen v. Burt, 67 N. Y. 30.

[22] Burke v. Roper, 79 Ala. 138; Gorman v. Russell, 14 Cal. 531; Buck v. Smith, 29 Mich. 166, 18 Am. Rep. 84; Lord v. Hull, 178 N. Y. 9, 70 N. E. 69, 102 Am. St. 484; Marshall v. Colman, 2 Jac. & W. 266, 22 Rev. Rep. 116; Anderson v. Anderson, 25 Beav. 190; Smith v. Jeyes, 4 Beav. 503; Crofton v. Horner, 5 Price 537; Lawson v. Morgan, 1 Price 303; Waters v. Taylor, 15 Ves. 10, 2 Ves. & B. 299, 13 R. R. 91; Carlen v. Drury, 1 Ves. & B. 154, 12 Rev. Rep. 203; Foss v. Harbottle, 2 Hare 461; Mozley v. Alston, 1 Phil. Ch. 790.

[23] Hoyt v. Sprague, 103 U. S. 613, 26 L. ed. 585; Pond v. Clark, 24 Conn. 370; Groenendyke v. Coffeen, 109 Ill. 325; Richards v. Todd, 127 Mass. 167; Drew v. Beard, 107 Mass. 64; Stout v. Seabrooks, 30 N. J. Eq. 187 (affd. 32 N. J. Eq. 826); Sturt v. Mellish, 2 Atk. 611; Sherman v. Sherman, 2 Vern. 276; Evans v. Smallcombe, L. R. 3 H. L. 249, 19 L. T. 207.

[24] Williams v. Williams, 221 Ill. 541, 77 N. E. 928; Smith v. Smith, 123 Minn. 431, 144 N. W. 138, 52 L. R. A. (N. S.) 1061.

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§ 774. Accounting—Dissolution.—The topics, Accounting and Dissolution, on account of their importance, have been discussed in separate chapters, bearing their respective titles, hence are not treated at this time and place, although logically falling under this chapter. Contrary to the general rule, it was held in a few jurisdictions that a common-law action known as account or account-render might lie between partners as to partnership transactions.[25] As to the effect of the codes abolishing distinctions between actions in law and equity, it has been said: "An action can not be maintained by one partner against another for a partial accounting, but he must either sue for a complete settlement and winding up of the partnership matters or to recover a balance struck and agreed between them."[26] The codes make a change only in the form of the action, none whatever in the nature of the remedy.

§ 775. Rescission of partnership contract.—There are conditions under which a partner may commence an action in a court of equity to rescind a contract of partnership, entered into by him on account of the fraud of the other partner or partners, in inducing him to enter the firm, and to reimburse him for money advanced, and to indemnify him against all liabilities which he may have incurred by reason of the partnership relation. A very ancient case, quoted by Mr. Lindley, and one of the landmarks in this branch of the subject, is that of Pellans v. Harkness,[27] in which one partner filed a bill against his partners for a discovery of their transactions, and for the recovery of

[25] Travers v. Dyer, 16 Blatchf. (U. S.) 178; Bailey v. Starke, 6 Ark. 191; Mickle v. Peet, 43 Conn. 65; Lee v. Abrams, 12 Ill. 111; Stuart v. Kerr, 1 Morr. (Iowa) 240; Neal v. Keel, 4 T. B. Mon. (Ky.) 162; Chase v. Garvin, 19 Maine 211; Hamilton v. Conine, 28 Md. 635, 92 Am. Dec. 724; Scott v. Searles, 5 Smed. & M. (Miss.) 25; Burley v. Harris, 8 N. H. 233, 29 Am. Dec. 650; Jaques v. Hulit, 16 N. J. L. 38; Appleby v. Brown, 24 N. Y. 143, 23 How. Prac. 207; Leonard v. Leonard, 1 W. & S. (Pa.) 342; Elmer v. Hall, 148 Pa. St. 345, 23 Atl. 971; Kendrick v. Tarbell, 27 Vt. 512; Tillar v. Cook, 77 Va. 477; Scott v. M'Intosh, 2 Campb. 238.

[26] Owen v. Meroney, 136 N. Cas. 475, 48 S. E. 821, 103 Am. St. 952, 1 Ann. Cas. 834.

[27] Colles, 442.

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the money advanced by him to the firm. It appeared that the defendant partners, through fraud, induced plaintiff to enter a partnership with them in the business of fishing, and to advance money to the firm, and, although defendant partners furnished nothing, they induced him, however, to sign a statement to the effect that he had bought their shares of the capital. For a considerable time they deceived him as to the true condition of affairs, and finally, when he became insistent, they advised him to look at certain books, which proved to have no entries touching upon the firm business. The court decreed that his position was well taken, rescinded the partnership agreement as to plaintiff, ordered the defendants to reimburse him for the money advanced and to indemnify him from any partnership liability. This was all done by the chancellor in the exercise of his jurisdiction over partnerships and fraudulent matters therein. The present American rule is practically the same, as is shown by a large number of reported American cases.[28] In one case[29] the court went so far as to hold that if equity finds a partnership contract to be void in its inception, on account of the fraud of one partner in inducing the other to enter into it, the damages that the fraudulent partner shall repay to the other include all sums the latter has paid into the firm as his portion of the capital stock; also a reasonable compensation for the time he has acted as copartner, and indemnity for all liability arising out of the business, and this seems to be the general and well accepted rule both in the law of this country and in that of England. It should be kept in mind, at this point, that equity does not lend its aid simply to equalize duties or division among partners,—to assist one partner in evading the effects of his poor judgment in making a bad judgment,—but acts purely for the purpose of relieving against fraud and mutual mistakes as to certain matters. It is also held[30] that slight and trivial reasons will not induce the setting aside of a settlement of partnership accounts and the

[28] Hynes v. Stewart, 10 B. Mon. (Ky.) 429. See ante § 222, on partnership agreement induced by fraud.

[29] Richards v. Todd, 127 Mass. 167.

[30] Gage v. Parmelee, 87 Ill. 329.

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sale by one partner to another of his interest, fairly and deliberately made, and evidenced by their written agreement, signed and sealed. This case indicates that the above rule as to fraud in the inception of the relation, relates, in a general way, also, to the closing of the relation. The test here, as elsewhere, in the law of partnership, is that of the utmost good faith between partners, or those about to enter into the relation.[31] A New York case[32] cites and approves a decision by Lord Justice Turner,[33] where the learned judge said: "We can not assume from what was done in ignorance of the misrepresentation, what would have been done if the misrepresentation had been detected." The court in the New York case continues: "The relation of partners is one implying the highest degree of mutual confidence, as it was well observed in the opinion below; and, if the contract of partnership was initiated by fraud, it is thereby avoided and annulled. The person fraudulently induced to enter into the partnership is entitled to a decree canceling the partnership agreement ab initio, as he can also have an action for the deceit.[33a] The trial court having found the making of the false representations, with the fraudulent intention to induce the defendant to enter into the partnership, no rule of law and no principle of equity stood in the way of its decreeing the cancelation of the agreement, and

[31] Ingraham v. Foster, 31 Ala. 123; Fogg v. Johnson, 27 Ala. 432, 62 Am. Dec. 771; White v. Smith, 63 Ark. 513, 39 S. W. 555; Howell v. Harvey, 5 Ark. 270, 39 Am. Dec. 376; Caldwell v. Davis, 10 Colo. 481, 15 Pac. 696; Hopkins v. Watt, 13 Ill. 298. See also Chase v. Garvin, 19 Maine 211; Cohoon v. Fisher, 146 Ind. 583, 44 N. E. 664, 45 N. E. 787, 36 L. R. A. 193; St. John v. Hendrickson, 81 Ind. 350; Richards v. Todd, 127 Mass. 167; Smith v. Everett, 126 Mass. 304; Rambo v. Patterson, 133 Mich. 655, 95 N. W. 722; Cash v. Powell, 55 N. J. Eq. 826, 41 Atl. 1115; Harlow v. La Brum, 82 Hun (N. Y.) 292, 31 N. Y. S. 487, affd. 151 N. Y. 278, 45 N. E. 859; Jones v. Weir, 217 Pa. 321, 66 Atl. 550, 10 Ann. Cas. 692; Fuller v. Atwood, 13 R. I. 316; Caplen v. Cox, 42 Tex. Civ. App. 297, 92 S. W. 1048; Kimmins v. Wilson, 8 W. Va. 584; Pillans v. Harkness, Colles 442; Rawlins v. Wickham, 3 DeG. & J. 304; Adam v. Newbigging, 13 App. Cas. 308, affg. 34 Ch. D. 582. See ante § 222, on partnership agreement induced by fraud.

[32] Harlow v. La Brum, 151 N. Y. 278, 45 N. E. 859.

[33] Rawlins v. Wickham, 3 DeGex & J. 304.

[33a] Citing 2 Bates Partn. 595; Pars. Partn. (2d ed.), *p. 467.

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in its directions as to the judgment to which the defendant was entitled it followed the requirement of the rule in such cases, as it may be found laid down in the books.[33b] It is a well-settled principle of law that if by any act of one of the parties the performance of a contract is rendered impossible, then the other party may rescind the contract, and this has been applied where a partner through bankruptcy became incapable of performing the partnership agreements.[34] A right to rescind a partnership agreement may be lost by ratification with knowledge of the facts,[35] or waived and a suit for damages instituted.[36]

§ 776. **Rescission of partnership contract under Uniform Partnership Act.**—The Uniform Partnership Act provides for the rescission of a partnership on the grounds of fraud or misrepresentation and makes the following provisions as to the rights of the parties on such rescission: Section 39. (Rights Where Partnership Is Dissolved for Fraud or Misrepresentation.)—"Where a partnership contract is rescinded on the ground of the fraud or misrepresentation of one of the parties thereto, the party entitled to rescind is, without prejudice to any other right, entitled: (a) To a lien on, or right of retention of, the surplus of the partnership property after satisfying the partnership liabilities to third persons for any sum of money paid by him for the purchase of an interest in the partnership and for

[33b] Citing Biglow Fraud, p. 629, and cases cited there.

[34] G sold an interest in his business under a partnership agreement for $1,000 cash and $1,000 at the end of one year, unless the purchaser desired to terminate the partnership at that time, in which event he was to receive back the money paid. G became a voluntary bankrupt before the expiration of the year. It was held that his trustee in bankruptcy could not recover the second instalment, the partnership being dissolved by a bankruptcy, so that the consideration for payment of the second instalment could not be performed. Hardy v. Weyer, 42 Ind. App. 343, 85 N. E. 731. See generally Panama & South Pacific Telegraph Co. v. India Rubber &c. Co., L. R. 10 Ch. App. 515.

[35] St. John v. Hendrickson, 81 Ind. 350; Andriessen's Appeal, 123 Pa. St. 303, 16 Atl. 840; Fuller v. Atwood, 13 R. I. 316. Compare Rambo v. Patterson, 133 Mich. 655, 95 N. W. 722.

[36] Cohoon v. Fisher, 146 Ind. 583, 44 N. E. 664, 45 N. E. 787, 36 L. R. A. 193; Rice v. Culver, 32 N. J. Eq. 601; Troster v. Dann, 83 Misc. 399, 145 N. Y. S. 56.

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any capital or advances contributed by him; and (b) to stand, after all liabilities to third persons have been satisfied, in the place of the creditors of the partnership for any payments made by him in respect of the partnership liabilities; and (c) to be indemnified by the person guilty of the fraud or making the representation against all debts and liabilities of the partnership."

§ 777. **Reformation of partnership contract.**—The subjects of rescission and of reformation of partnership contracts are closely related, and at first view it might appear that a defrauded partner would, in most instances, have an election as to which remedy to pursue. As a rule, however, this is not true, for in a contract of partnership, which may be rescinded because one partner has deceived another, how can it also be reformed to conform to the real intention of the parties thereto? In the one case, there is a meeting of the minds of the parties, which, however, equity will set aside on account of the wrong practiced on one partner by the other. In the other case, the apparent contract does not conform to the actual agreement made by the parties. The usual basis of the one is fraud, of the other, mistake of the parties.

§ 778. **Specific performance of partnership contracts.**—It is an elementary principle in the law of contracts, in general, that one party may, upon breach of the contract by the other party, elect whether to treat the contract as broken, and sue the offending party for damages, in an action at law, which action has been treated heretofore, or to compel the offending party to carry out the terms of his agreement, by an equitable action for specific performance, when such an action may be brought under the circumstances of the case. The partnership law, with some exceptions, noted herein, differs from the general rules, as to specific performance. Partnership is based upon the greatest good faith and confidence between the partners, owing to the complex and confidential nature of the relations and liabilities existing between partners, and, consequently, the policy of

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the courts of equity is not to compel one party to continue as partner of another, regardless of his contract therefor, leaving the injured partner to his action at law for damages for the breach. The reason is very apparent. The partner breaking the contract may see, from the conduct of his copartner, perhaps in little evidences of unreliability, or of personal habits, or other such matters, none of which might be of sufficient degree to justify a termination of the contract, without liability, that there is, however, grave danger to himself in the continuation of the relation, and he may be willing to pay damages for breach of the partnership agreement, rather than to continue the relation, with its resulting liability. It is held[38] that an agreement to enter into a partnership, and, as a partner, to use and exercise personal skill and judgment in the control and management of the partnership business, is not enforcible specifically. The court in one case said:[39] "We consider it very clear that the case which the complainant makes by his bill is not suitable for the jurisdiction invoked. The power vested in courts of equity to compel the specific performance of contracts, instead of leaving parties in all cases to obtain common-law redress through actions for damages, is a very useful one, when legitimately exercised. It must, however, be borne in mind that the jurisdiction has many necessary limits and qualifications, and that it does not necessarily attach or operate with imperative force wherever a contract relation exists which the complainant has respected and the defendant has not. In each case the court must consider whether,

[38] Levine v. Michel, 35 La. Ann. 1121; Buck v. Smith, 29 Mich. 166, 18 Am. Rep. 84; Reed v. Vidal, 5 Rich. Eq. (S. Car.) 289. See also Clark v. Truitt, 183 Ill. 239, 55 N. E. 683; Roberts v. Kelsey, 38 Mich. 602. But compare Somerby v. Buntin, 118 Mass. 279, 19 Am. Rep. 459; Morris v. Peckham, 51 Conn. 128; Whitworth v. Harris, 40 Miss. 483; Meason v. Kaine, 63 Pa. St. 335; Scott v. Rayment, L. R. 7 Eq. 112, 38 L. J. Ch. 48; Sheffield Gas Consumers' Co. v. Harrison, 17 Beav. 294; Buxton v. Lister, 3 Atk. 383; England v. Curling, 8 Beav. 129; Syers v. Syers, 1 App. Cas. 174, 35 L. T. 10, 24 Wkly. Rep. 970; Stocker v. Wedderburn, 3 Kay & J. 393, 26 L. J. Ch. 713, 5 Wkly. Rep. 671; Sichel v. Mosenthal, 30 Beav. 371, 31 L. J. Ch. 386, 8 Jur. (N. S.) 275, 5 L. T. 784, 10 Wkly. Rep. 283.

[39] Buck v. Smith, 29 Mich. 166, 18 Am. Rep. 84.

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in view of all the facts and those doctrines which are interwoven with the very texture of equity jurisprudence, and in view of the specific peculiarities presented, and the settled principles and maxims of the court, it is right and proper to entertain the case and administer relief.[40] Among the primary considerations is the question whether the substantial sense and design of both parties can be worked out by the decree of the court, since the real equity of the proceeding, the spirit of the particular jurisdiction, means performance on both sides and not a compulsory surrender by one party to another without a present substantial and practical equivalent, an equivalent susceptible of enforcement and execution by the court. Now, what is the real essence of the case made by this bill? What is the arrangement the court is asked to carry out? It is an agreement, according to the representation of complainant, between himself and the defendant, by which the latter agreed to convey an undivided interest in real and personal property held by defendant in common with third persons, and that the complainant should, for an indefinite time, become a partner with the defendant and such third persons in operating the property; that the defendant should advance from time to time the complainant's quota of the funds necessary for the business and the improvement of the property; that the complainant should have the right to manage and direct the business and the improvements; and that he would employ his time, skill, judgment, and experience in the direction and supervision of the property and business, and that the purchase-price of his proprietary share, and the amount advanced for his benefit in carrying on the business, should be paid by his skill and services in the concern, and the gains obtained in the enterprise. Waiving all objection founded on the circumstance that the bill does not assert that McDonald and MacArthur became in any manner engaged with complainant to admit him to a partnership, or to clothe him with any right of power to manage their inter-

[40] Citing McMurtrie v. Bennette, Har. (Mich.) 124; Smith v. Lawrence, 15 Mich. 499; Chambers v. Livermore, 15 Mich. 381; Willard v. Tayloe, 8 Wall. (U. S.) 557.

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ests, we first encounter the rule, which is pretty well recognized, that the court will not enter upon so vain an undertaking as to compel a party to go into partnership where the agreement is silent as to its duration, and where, therefore, it may be dissolved at the will of either as soon as formed. But, secondly, we confront the inevitable and very formidable objection that the agreement by its very nature is practically not enforcible on both sides. It is extremely plain that the court can not assume to enforce the performance of daily prospective duties, or supervise or direct in advance the course or conduct of one who is to control and manage in the interest of a firm in which he is to stand as a member, and where, too, the stipulated aarangement as plainly set forth contemplates that his personal skill and judgment shall be applied and govern according to the shifting needs of property and business. No court is competent to execute such an arrangement. The complainant's portion of the executory scheme, then, which relates to his introduction to the position of partner and manager, to his rights and duties in that position and to the agreed method for working out the compensation to be made by him for the benefit he seeks, can not be specifically enforced. Looking at the case made by the bill, the court is powerless to execute the equivalent the complainant is bound to render. If a conveyance to the complainant should be ordered, he would get at once the essence of what he claims, whilst the defendant would fail in getting, through a decree, any substantial consideration whatever. As the court possesses no means by which to work out performance on the part of the complainant, he would become at once invested with the benefit for which he prosecutes, whilst the defendant would be left standing upon a naked right to exact the consideration through the future performance of duties incapable of being specifically decreed. The doctrine of the court will not sanction such one-sided relief."[41]

[41] Citing Blackett v. Bates, L. R. 1 Ch. App. 117, 2 H. & M. 610; Stocker v. Brockelbank, 5 E. L. & E. 67; Johnson v. Shrewsbury & B. R. W. Co., 19 E. L. & E. 584; Pickering v. Bishop of Ely, 2 Y. & Coll. C. C. 249, 12 L. J. Ch. 271, 7 Jur. 479; Kemble v. Kean, 6 Sim. 333; Kimberly v. Jennings, 6 Sim. 340, 5 L. J. Ch. 115; Baldwin v. Society for Dif-

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On the contrary, under some conditions agreements relating to partnerships will be enforced specifically, when the reasons above given for refusal to apply this remedy do not apply. For example, one partner may compel another to apply partnership funds to partnership debts,[42] or compel his associates to adhere to the terms of the partnership agreement as long as they choose to continue the firm,[43] specific performance has been decreed where one partner has contributed thereto his share and the other partner refuses to carry out this part of the agreement,[44] for the execution of some formal instrument, the failure of which would cause the partner asking it loss, and which the other party has agreed to do,[45] or in some instances a decree of specific performance of a partnership agreement has been granted, in order to make a foundation for an accounting,[46] or to secure to a partner interests in property rights to which he is entitled.[47] And an agreement for sharing of profits has been enforced, even though it created a partnership.[47a]

§ 779. Specific performance after dissolution.—Mr. Lindley has said:[48] "With respect to the specific performance, after a dissolution of partnership, all agreements entered into by the partners previously to, or at the time of dissolution, it need only be observed that relief will be granted or refused upon the principles by which the court is ordinarily guided in questions of specific performance, and that nothing turns on the circumstance of the litigants having been partners. For purposes of reference, it may be useful to mention that the court has

fusing &c., 9 Sim 394, 2 Jur. 161; Gervais v. Edwards, 2 Dr. & W. 80, 1 Con. & L. 242, 4 Ir. Eq. R. 555; Bozon v. Farlow, 1 Mer. 459; Flight v. Bolland, 4 Russ. 298, 28 Rev. Rep. 101.

[42] Gridley v. Conner, 2 La. Ann. 87.

[43] Kean v. Johnson, 1 Stockt. (N. J.) 401.

[44] Birchett v. Bolling, 5 Munf. (Va.) 442; Whitworth v. Harris, 40 Miss. 483.

[45] Stocker v. Wedderburn, 3 Kay & J. 393, 26 L. J. Ch. 713, 5 W. R. 671; Buxton v. Lister, 3 Atk. 385.

[46] Dale v. Hamilton, 5 Hare 369, 2 Phil. Ch. 266.

[47] Somerby v. Buntin, 118 Mass. 279, 19 Am. Rep. 459.

[47a] Donohoe v. Rogers, 168 Cal. 700, 144 Pac. 958.

[48] Lindley Partnership (8th ed.), p. 553.

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enforced the following agreements entered into, upon or with a view to a dissolution, namely: Agreements not to carry on business within a certain distance or for a certain space of time;[49] agreements by one partner to withdraw from a firm and assign his share to his copartners;[50] agreements as to the custody of partnership books and the furnishing of copies thereof;[51] agreements that a third party, and he only, shall get in debts;[52] agreements that the value of the shares of an outgoing or a deceased partner shall be ascertained in a specified way and taken accordingly;[53] agreements that an outgoing partner shall offer his share to his copartners, before selling it to other persons;[54] agreements to grant an annuity to a retiring partner and his widow;[55] agreements not to divulge or make use of a trade secret.[56] The general rule (of no specific performance) above stated may be said to apply to attempts to continue or pursue a partnership, while the exceptions, as a rule, apply to those agreements which do not imply retaining the relation and the corresponding liabilities. Therefore, when the exceptions do govern, and a partnership is created, it may be, as a general rule, dissolved. subject, of course, to an action for damages therefor.

[49] Citing Whittaker v. Howe, 8 Beav. 383; Turner v. Major, 3 Giff. 442, 8 Jur. (N. S.) 909, 5 L. T. 600, 10 W. R. 243; Coates v. Coates, 6 Madd. 287; Williams v. Williams, 1 Wils. Ch. 473, note.

[50] Citing Gray v. Smith, 43 Ch. D. 208, 62 L. T. 335, 38 W. R. 310, 59 L. J. Ch. 145.

[51] Citing Lingen v. Simpson, 1 Sim. & Stu. 602, 24 Rev. Rep. 249, and see Whittaker v. Howe, 8 Beav. 383.

[52] Citing Davis v. Amer, 3 Drew. 64; Turner v. Major, 3 Giff. 442, 8 Jur. (N. S.) 909, 5 L. T. 600, 10 Wkly. Rep. 243.

[53] Citing Morris v. Kearsley, 2 Y. & C. Ex. 139; Essex v. Essex, 20 Beav. 442; King v. Chuck, 17 Beav. 325; Daw v. Herring (1892), 1 Ch. 284, 61 L. J. Ch. 5, 65 L. T. 782, 40 Wkly. Rep. 61; Featherstonhaugh v. Turner, 25 Beav. 382, 28 L. J. Ch. 812, and Gibson v. Goldsmid, 5 DeG., M. & G. 757, 24 L. J. Ch. 279, 3 Eq. R. 106, 1 Jur. (N. S.) 1, 3 W. R. 79, revg. 18 Beav. 584.

[54] Citing Homfray v. Fothergill, L. R. 1 Eq. 567, 14 L. T. 49.

[55] Citing Aubin v. Holt, 2 K. & J. 66, 25 L. J. Ch. 36, 4 Wkly. Rep. 112; Page v. Cox, 10 Ha. 163. See also Murray v. Flavell, 25 Ch. D. 89, 53 L. J. Ch. 185, 32 Wkly. Rep. 102, and Bonville v. Bonville, 6 Jur. (N. S.) 414.

[56] Citing Morison v. Moat, 9 Hare 241.

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§ 780. **Injunctions.**—In distinction to the remedy of specific performance, or the compelling to do a certain thing, is the remedy of injunction, which is, except as to mandatory injunctions, the restraint from doing a certain thing. Injunction, like specific performance, lies in proper cases, in partnership, but must not, as a rule, be allowed to interfere with the peculiar phases of partnership law. It has been said:[57] "There can be no such thing as an indissoluble partnership. Every partner has an indefeasible right to dissolve the partnership as to all future contracts by publishing his own volition to that effect. * * * There may be cases in which equity would enjoin a dissolution for a time, when the circumstances were such as to make it specifically injurious; but no question of equitable restraint arises here. When one partner becomes dissatisfied there is commonly no legal policy to be subserved by compelling a continuance of the relation, and the fact that a contract will be broken is no argument against the right to dissolve. Most contracts may be broken at pleasure, subject, however, to responsibility in damages. This decision, therefore, while conceding that there might possibly be some instances in which an injunction might restrain a dissolution temporarily, holds that it can go no further, and that in most cases will not be allowed to any extent in opposing the withdrawal of a partner.[58] Although, as has been seen, injunctions against dissolution are very generally refused, owing to the peculiar rules and nature of partnership, yet there are many conditions under which injunctions will be granted in partnership affairs, and they will be here treated under their various headings.

§ 781. **Injunction to prevent breach of agreement.**—We have just seen that, in nearly all cases, a contract to continue a partnership may be broken, yet, as long as the partners may all see fit to continue the partnership, it by no means follows that in such a case the rule would apply, so as to enjoin one or more of the partners from doing certain acts, in violation

[57] Solomon v. Kirkwood, 55 Mich. 256, 21 N. W. 336.

[58] Skinner v. Dayton, 19 Johns. 513, 10 Am. Dec. 286; Mason v. Connell, 1 Whart. (Pa.) 381; Slemmer's Appeal, 58 Pa. St. 155, 98 Am. Dec. 248.

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of the partnership agreements, and prejudicial to the copartners.[59] Mr. High thus treats this question: "Courts of equity will entertain jurisdiction to prevent by injunction members of a copartnership from the commission of acts inconsistent with the terms of their agreement and from violating the rights of their copartners. The jurisdiction is founded upon well established principles of equity, and is exercised irrespective of whether a dissolution of the partnership is sought."[59a]

§ 782. Injunction to restrain change in the application of profits.—When the partners have agreed upon a mode of distribution of profits, and some of the partners attempt to change the mode of distribution, without the consent of all the partners, the nonassenting partner or partners may maintain an action enjoining his copartner from deviating from the original plan agreed upon by them.[60]

§ 783. Injunction against change in nature of partnership business.—No number less than all can change the general nature of the business of the firm, this rule having its origin early in English law, being recognized in the old English decisions about the year 1824, in the case of Natusch v. Irving.[61] One Natusch, who was a partner in a fire and life insurance company, commenced an action against certain of his partners, asking, among other matters, an injunction restraining them from entering the business of marine insurance, to which added business he had not assented, and the injunction was allowed. Lord Eldon, delivering the opinion, gave some very pertinent observations on the question. "Courts," said he, "must struggle to prevent particular members of those bodies (partnerships)

[59] Marble Co. v. Ripley, 10 Wall. (U. S.) 339, 19 L. ed. 955; Pirtle v. Penn, 3 Dana (Ky.) 247, 28 Am. Dec. 70; Levine v. Michel, 35 La. Ann. 1121; Ballou v. Wood, 8 Cush. (Mass.) 48; New v. Wright, 44 Miss. 202; Van Keuren v. Trenton Locomotive & Machine Mfg. Co., 13 N. J. Eq. 302; Hall v. Hall, 3 Macn. & G. 79, 20 L. J. Ch. 585, 15 Jur. 363.

[59a] High Injunctions, Vol. II, p. 330.

[60] Const v. Harris, Turn. & R. 496, 24 Rev. Rep. 108.

[61] 2 Coop. C. C. 358; Gow on Partnership (3d ed.), App. 398.

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from engaging other members in projects in which they have not consented to be engaged, or the engaging in which they have not encouraged, assented to or empowered, or acquiesced in, expressly or tacitly, so as to make it not equitable that they should seek to restrain them. The principles which a court would act upon in the case of a partnership of six, must, as far as the nature of things will admit, be applied to a partnership of six hundred. * * * They who seek to embark a partner in a business not originally part of the partnership concern, must make out clearly that he did expressly or tacitly acquiesce." The question as to what acts constitute acquiescence by the objecting partner is perhaps left open, to be determined upon an investigation of the particular facts of each individual case, but the general rule holds that the objecting partner is entitled to an injunction against any change in the general nature of the business, unless he has, by express consent, general or specific, or by such acts as create an estoppel against him, consented to the change. Undoubtedly, however, the articles of partnership might be so drawn as to give a certain number the right to make a change in the nature of the business, without further consent on the part of their copartners. It seems also that the nature of the partnership might in itself give the right to a number less than all to make changes without the consent of the copartners, although such an occurrence would be very rare, indeed.

§ 784. Injunction against commencing legal actions.—In early English law, injunctions were allowed to restrain certain actions, but this right was curtailed until, in 1860, when Mr. Lindley first published his admirable work on partnership, this right had been practically abolished. Mr. Lindley thus states the English law at that period: "Although injunctions to restrain actions are now abolished, it may be useful to observe that where surviving partners gave the executors of their late partner a bond for the amount of his share, the amount of which had not been ascertained, an action on the bond was stayed on its being shown that if the partnership accounts were taken it would appear that the surviving partners had already paid too

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much. But an action for the balance of a settled account would not be restrained merely because there were other unsettled accounts between the parties; nor would a court of equity interfere to prevent a shareholder of a company, who was a creditor of that company, from executing a judgment obtained against it by him as a creditor."[61a] The American law has relaxed, somewhat, the later English law, and will, in many instances, grant injunctions to restrain actions. Thus in a case,[62] where one partner filed a bill in equity, in which he asked an injunction against his copartner, who owned the legal title to property which equitably belonged to the firm, and who had recovered a judgment in ejectment against the complainant, from enforcing the judgment pending the hearing of complainant's bill for an account and settlement of the partnership, the court held that an injunction might issue. The same general rule of recognition of injunctions to restrain actions has often been recognized.[63]

§ 785. **Injunction against dissolution.**—As a general rule, injunctions will not be allowed to prevent dissolution, as we have seen that any partnership may be dissolved by any member, even in the face of a contract to the contrary (there being, of course, an action in damages for the breach). As has been said, there is no such thing as an indissoluble partnership. However, "there may be cases in which a court of equity would enjoin a dissolution for a time, when the circumstances were such as to make it specially injurious."[64] Such a case, it must be admitted, is rare, and the necessity of a relaxation of the general rule must be plainly shown. "A court of equity, doubtless, will not assist the partner breaking his contract to procure a dissolution of the partnership, because, upon familiar principles, a partner who has not fully and fairly performed the partnership

[61a] Lindley Partnership, *p. 543.

[62] Wells v. Strange, 5 Ga. 22.

[63] Mowbray v. Lawrence, 13 Abb. Pr. (N. Y.) 317, 22 How. Pr. 107. See also Moody v. Payne, 2 Johns. (N. Y.) Ch. 548.

[64] Solomon v. Kirkwood, 55 Mich. 256, 21 N. W. 336. See also Karrick v. Hannaman, 168 U. S. 328, 42 L. ed. 484, 18 Sup. Ct. 135.

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agreement on his part has no standing in a court of equity to enforce any rights under the agreement.[65] But, generally speaking, neither will it interfere at the suit of the other partner to prevent the dissolution, because, while it may compel the execution of articles of partnership so as to put the parties in the same position as if the articles had been executed as agreed, it will seldom, if ever, specifically compel subsequent performance of the contract by either party, the contract of partnership being of an essentially personal character.[66] Especially where by the partnership agreement, as in the case at bar, the defendant is to supply all or most of the capital, and the plaintiff is to furnish his personal services, the agreement can not be specifically enforced against the plaintiff, and will not be enforced against the defendant."[67]

§ 786. Other acts enjoined.—The exclusion of one partner from the business has been held ground for an injunction the court saying in one case:[68] "Any unauthorized attempt by one to oust the other from the position and rights assigned to him by the contract was, therefore, not only a breach of their agreement, but a fraud upon the relation they had assumed to each other. Such a wrong it is the province of a court of equity to prevent. A chancellor will interfere by injunction to restrain one partner from violating the rights of his copartner even when a dissolution of the partnership is not necessarily contemplated."[69] Among other acts enjoined by the courts have been

[65] Karrick v. Hannaman, 168 U. S. 328, 42 L. ed. 484, 18 Sup. Ct. 135; citing Rutland Marble Co. v. Ripley, 77 U. S. 339, 19 L. ed. 955.

[66] Citing Batten Specific Performance, 165-167; 3 Lindley Partnership, ch. 10, § 4; Pomeroy Spec. Perf. § 290; Scott v. Rayment, L. R. 7 Eq. 112, 38 L. J. Ch. 48; Satterthwait v. Marshall, 4 Del. Ch. 337; Somerby v. Buntin, 118 Mass. 279, 19 Am. Rep. 459; Reed v. Vidal, Rich Eq. (S. Car.) 289.

[67] Citing Stocker v. Wedderburn 3 Kay & J. 393, 26 L. J. Ch. 713, W. R. 671; Buck v. Smith, 29 Mich 166, 18 Am. Rep. 84.

[68] Rutland Marble Co. v. Ripley, Wall. (U. S.) 339, 19 L. ed. 955.

[69] Miller v. O'Boyle, 89 Fed. 140 Pirtle v. Penn, 3 Dana (Ky.) 24 28 Am. Dec. 70; McCabe v. Sin

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using partnership property contrary to agreement[70] and carrying on a competing business.[71] An injunction will not be granted where the effect would be to exclude one partner from the business, against his will.[72]

§ 787. Injunction in action for dissolution or after dissolution.—In an action for dissolution or for accounting after dissolution by death of a partner, equity will enjoin acts of a partner which will interfere with proper winding up of partnership affairs, such as carrying on the business for a purpose other than winding it up;[73] from improperly interfering with the business;[74] from collecting debts and assets of the firm;[75] from damaging the value of the good will;[76] from issuing, accepting, or indorsing bills of exchange in the firm name for other than partnership purposes;[77] from withholding the partnership books.[78] A surviving partner may be enjoined from improperly disposing of partnership assets;[79] or from wrongfully ejecting the deceased partner's representatives.[80] On dissolution, a partner

clair, 66 N. J. Eq. 24, 58 Atl. 412; Petit v. Chevelier, 13 N. J. Eq. 181; Wolbert v. Harris, 7 N. J. Eq. 605; Fitzgerald v. Flynn (R. I.), 69 Atl. 921; Hall v. Hall, 12 Beav. 414.

[70] New v. Wright, 44 Miss. 202; Hall v. Hall, 12 Beav. 414.

[71] Marshall v. Johnson, 33 Ga. 500; Crownfield v. Phillips (Md. App.), 92 Atl. 1033; Holladay v. Faurot, 8 Ohio Dec. (Reprint) 633; Kemble v. Kearn, 6 Sim. 333. See also Stockdale v. Ullery, 37 Pa. St. 486, 78 Am. Dec. 440; England v. Curling, 8 Beav. 129.

[72] Salmon v. Salmon, 178 Ala. 672, 60 So. 837.

[73] De Tastet v. Bordenave, Jac. 516; Marshall v. Watson, 25 Beav. 501; Wilson v. Fitchter, 11 N. J. Eq. 71.

[74] Smith v. Jeyes, 4 Beav. 503; Charlton v. Poulter, 19 Ves. 148, note.

[75] O'Brien v. Cooke, Ire. R. 5 Eq. 51; Read v. Bowers, 4 Brown Ch. 441.

[76] Angier v. Webber, 14 Allen (Mass.) 211, 92 Am. Dec. 748; Turner v. Major, 3 Giff. 442, 8 Jur. (N. S.) 909, 5 L. T. 600, 10 W. R. 243; Bradbury v. Dickens, 27 Beav. 53, 28 L. J. Ch. 667; Trego v. Hunt, 65 L. J. Ch. (N. S.) 1, A. C. 7, 73 L. T. 514, 44 W. R. 225.

[77] Williams v. Bingley, 2 Vern. 278n; Jarvis v. White, 7 Ves. 413; Hood v. Aston, 1 Russ. 412, 25 Rev. Rep. 93; Collyer Partnership, 233.

[78] Taylor v. Davis, 3 Beav. 388n; Greatrex v. Greatrex, 1 DeGex & S. 692, 11 Jur. 1052.

[79] Hartz v. Schrader, 8 Ves. 317.

[80] Hawkins v. Hawkins, 4 Jur. (N. S.) 1044; Elliot v. Brown, 3 Swanst. 489.

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will be enjoined from injuring firm property.[81] After dissolution a former partner may be enjoined from breaking special agreements entered into, such as not to collect debts of the firm;[82] not to carry on business;[83] not to divulge a trade secret;[84] or if he has sold the good will from so carrying on business as to lead persons to believe he was the successor of the firm,[85] and other similar acts.[86]

§ 788. Receiverships.—The subjects of injunctions and of receiverships are closely related, and in perhaps the greater number of cases involving one, the other is also resorted to. In fact, as pointed out by Mr. Lindley, a receivership necessarily acts as an injunction, for the court will not allow the receiver, its own officer, to be disturbed in his conduct of the business by a partner, yet there are many cases where a receivership is not demanded or desired, where an injunction is necessary and proper, as, for example, where the offending partner does not directly interfere with the receiver, but indirectly injures or opposes him. It will be perceived that a receivership acts as an injunction only in a limited number of cases, and is only inferential even then, so that in case some specific matters are desired to be protected, it is better to have an injunction granted, when possible, against the specific point involved. Moreover, there may be many instances in which a receiver would be unnecessary, even detrimental, and where simply an injunction will serve every purpose. The object of an injunction is to compel or prohibit the doing of a certain thing. The object of a receivership is to hold the

[81] Marshall v. Watson, 25 Beav. 501; Allen v. Kilbre, 4 Madd. 464; Bevan v. Lewis, 1 Sim. 376, 27 Rev. Rep. 205.

[82] Davis v. Amer, 3 Drew. 64; Hartz v. Schrader, 8 Ves. 317, 7 Rev. Rep. 55; Ellis v. Commander, 1 Strob. Eq. (S. Car.) 188.

[83] Whittaker v. Howe, 8 Beav. 383.

[84] Roberts v. McKee, 29 Ga. 161; Morison v. Moat, 9 Hare 241.

[85] Churton v. Douglas, Johns (Eng.) Ch. 174, 28 L. J. Ch. 841 5 Jur. (N. S.) 887, 7 W. R. 365. See ch. 12, § 317 et seq., ch. 10, § 266.

[86] Wilkinson v. Tilden, 9 Fed. 683 Fletcher v. Vandusen, 52 Iowa 448 3 N. W. 488; Shannon v. Wright, 6 Md. 520. See also McGowan Bro Pump & Machine Co. v. McGowan 22 Ohio St. 370.

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property, by an officer of the court, for the use of all the creditors, also of the partners, as their interests appear, and, in the interests of the estate, the court may authorize the receiver to continue the business of the firm (in case there is a business) for limited times. The ordinary duty of a receiver is simply to hold the assets until further order of the court, or to dispose of the same as soon as practicable, and to hold the proceeds. The court may, however, if it be considered for the best interests of the business, allow the receiver to act as manager of the business, or to hire some other person as such manager, and conduct the business of the firm, as a going concern, thus protecting the good will of the business, and realizing upon the same upon a sale of the assets. The positions of receiver and manager are not identical, and may be either held by one person, or may be placed in different persons, although the manager must necessarily be under the direction of the receiver, as the receiver is responsible for the assets of the firm. The English law has long held that a receiver may be appointed, although no dissolution is sought,[87] but has made a distinction when a manager is asked, holding that in such a case a dissolution must be sought. Lord Cottenham,[88] and Lord Eldon,[89] held strongly to this principle. Lord Eldon stated, that the court would not, by appointing receivers, take upon itself the management of every trade in the kingdom; nor will it take upon itself the management of *any* partnership business, save with a view of its final winding up. However, this rule, like most other well established rules, is subject to exception. Thus, where, certain members of a firm filed a bill, alleging misappropriation of funds by certain directors, and asking a receiver and manager. Although it was not certain that dissolution would be necessary, and was not definitely asked unless it should appear necessary, the court appointed a receiver and manager to protect what remained of the assets until the hearing of

[87] Const v. Harris, Turn. & R. 517, 24 Rev. Rep. 108.

[88] Hall v. Hall, 3 Macn. & G. 79, 20 L. J. Ch. 585.

[89] Roberts v. Eberhardt, 1 Kay 148, 23 L. J. Ch. 201, 2 W. R. 125.

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the cause, upon the ground that plaintiff had an interest in the funds in question, and that these funds were in danger of being lost.[90] But ordinarily a receivership will not be appointed unless a dissolution is sought.[91]

§ 789. Receiverships on account of misconduct of a partner.—It is largely within the discretion of the court as to whether a receiver will be appointed in partnership matters.[92] There is nothing which gives a partner a more undoubted right to a receiver for the firm business than the misconduct of his partner therein, especially when this misconduct wastes or tends toward wasting the firm assets. Thus, in a leading case[93] one partner, Augustus Hoexter, had brought about through his misconduct, loss and waste in the firm property. In the suit growing out of the matter, the court laid down the following statement: "This appeared to be a very plain case for the prompt intervention of a court of equity and for the sequestration of the firm assets in the hands of a receiver, upon facts showing the condition of embarrassment in the affairs of the firm, which Augustus Hoexter had brought about by his misconduct." In case of the death of one of the partners, the surviving partner has no right to hold and mingle the firm assets with his own, so that they can not be distinguished, unless he gives bond and also conforms to statutory provisions, and the administrator of the deceased partner may have a receiver appointed, unless such bond be furnished.[94] It may be here stated, that not every little act of misconduct or of difference between the partners will constitute grounds for the appointment of a receiver. The acts must be so great or of such importance that the conduct

[90] Evans v. Coventry, 5 DeG., M. & G. 911.

[91] Campbell v. Rich Oil Co., 29 Ky. L. 716, 96 S. W. 442; Sieghortner v. Weissenborn, 20 N. J. Eq. 172; McElvey v. Lewis, 76 N. Y. 373; Garretson v. Weaver, 3 Edw. (N. Y.) 385; Sloan v. Moore, 37 Pa. St. 217; Style v. Lantrip (Tex. Civ. App.), 171 S. W. 786; Ramsey v. Bird (Tex.), 147 S. W. 671; Goodman v. Whitcomb, 1 Jac. & W. 589.

[92] Gillett v. Higgins, 142 Ala. 444, 38 So. 664.

[93] Continental Nat. Bank v. Strauss, 137 N. Y. 148, 32 N. E. 1066.

[94] Jennings v. Chandler, 10 Wis. 21.

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or dissolution of the firm business will be seriously impaired thereby. Equity will not lend the aid of its strong arm to adjust mere lapses of good feeling, or of proper interest in the firm business, but looks for some gross abuse by one or more partners of their firm duties.[95] Misconduct may be ground for a receivership, such as collusion with debtors;[96] carrying on a separate trade for himself with partnership property;[97] making away with partnership assets;[98] mismanagement endangering the whole business;[99] fraudulent confusion of debts with those of other firms of which some of the partners were members, and confessing judgments in favor of relatives;[1] danger of loss or destruction of firm property,[2] or general disregard of duty of good faith to partners as implied in every partnership contract.[3] The exclusion of a partner from the business is always ground for a receivership.[4] If a partnership is alleged, where a receiver is asked, it is usually held that a court will not appoint a receiver until proof is made of the existence

[95] O'Bryan v. Gibbons, 2 Md. Ch. 9; Loomis v. McKenzie, 31 Iowa 425; McElvey v. Lewis, 76 N. Y. 373; Henn v. Walsh, 2 Edw. Ch. (N. Y.) 129; Sloan v. Moore, 37 Pa. St. 217; Roberts v. Eberhardt, 1 Kay 148, 23 L. J. Ch. 201, 2 W. R. 125.

[96] Estwick v. Conningsby, 1 Vern. 118.

[97] Harding v. Glover, 18 Ves. 281.

[98] Evans v. Coventry, 5 DeGex, M. & G. 911.

[99] Reinhardt v. Reinhardt, 134 App. Div. 440, 119 N. Y. S. 285; Cohn v. Wahn, 117 N. Y. S. 633; De Tastet v. Bordicu, 2 Brown Ch. 272n.

[1] Watson v. Bettman, 88 Fed. 825.

[2] Holtenstein v. Conrad, 9 Kans. 435.

[3] Boyce v. Burchard, 21 Ga. 74; Maher v. Bull, 44 Ill. 97; Saylor v. Mocklie, 9 Iowa 209; Haight v. Burr, 19 Md. 130; Rolfe v. Burnham, 110 Mich. 660, 68 N. W. 980; Sutro v. Wagner, 23 N. J. Eq. 388; Evans v. Evans, 9 Paige (N. Y.) 178; Webb v. Allen, 15 Tex. Civ. App. 605, 40 S. W. 342; Cole v. Price, 22 Wash. 18, 60 Pac. 153.

[4] Einstein v. Schnebly, 89 Fed. 540; Gillett v. Higgins, 142 Ala. 444, 38 So. 664; Leeds v. Townsend, 74 Ill. App. 444; Barnes v. Jones, 91 Ind. 161; Hottenstein v. Conrad, 9 Kans. 435; Katz v. Brewington, 71 Md. 79, 20 Atl. 139; Heathcot v. Ravenscroft, 6 N. J. Eq. 113; Marten v. Van Schaick, 4 Paige (N. Y.) 479; Van Rensselaer v. Emery, 9 How. Pr. (N. Y.) 135; McElvey v. Lewis, 76 N. Y. 373; Richards v. Baurman, 65 N. Car. 162; Sloan v. Moore, 37 Pa. St. 217; Shulte v. Hoffman, 18 Tex. 678; Rische v. Rische, 46 Tex. Civ. App. 23, 101 S. W. 849; Holder v. Shelby (Tex. Civ. App.), 118 S. W. 590; Wilson v. Greenwood, 1 Swanst. 471; Goodman v. Whitcomb, 1 Jac. & W.

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of a partnership.[5] If the partnership has been dissolved, the rule is not applied so strictly, and a receiver will be appointed upon a smaller showing. Receiverships after dissolution were treated in a former chapter.[6]

589; Rowe v. Wood, 2 Jac. & W. 558, 22 Rev. Rep. 208; Const v. Harris, Turn. & R. 525, 24 Rev. Rep. 108; Kershaw v. Matthews, 2 Russ. 62, 26 Rev. Rep. 13; Blakeney v. Dufaur, 15 Beav. 40; Hale v. Hale, 4 Beav. 369. See also Sheppard v. Oxenford, 1 Kay & J. 491; Peacock v. Peacock, 16 Ves. 49, 10 Rev. Rep. 138.

[5] Leeds v. Townsend, 74 Ill. App. 444; Hobart v. Ballard, 31 Iowa 521; Hottenstein v. Conrad, 9 Kans. 435; Guyton v. Flack, 7 Md. 398; McCarty v. Stanwix, 16 Misc. 132, 38 N. Y. S. 820; Baxter v. Buchanan, 3 Brewst. (Pa.) 435; Rische v. Rische, 46 Tex. Civ. App. 23, 101 S. W. 849; Peacock v. Peacock, 16 Ves. 49.

[6] See ch. 19.

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CHAPTER XXV

ACTIONS INVOLVING PARTNERS AND PARTNERSHIPS

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§ 795. Parties in actions involving partnerships.—One of the first matters to be considered, and one of the most important,

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in actions involving partners and partnerships, is that of proper and necessary parties, plaintiff and defendant. In the first place, should the firm itself or the members thereof be named? This will depend somewhat, perhaps, in each jurisdiction upon the view adopted in that jurisdiction regarding partnership entity, but the more general rules are stated below. The rule at common law, which is still the rule except where modified by statute, is that partnerships can not sue or be sued in the firm name, and in suits by or against a partnership, each partner must be made a party by his individual name, and all the partners must join or be joined.[1] So in many cases, where a judgment has been

[1] Great Southern Fire Proof Hotel Co. v. Jones, 177 U. S. 449, 44 L. ed. 842, 20 Sup. Ct. 690; Chapman v. Barney, 129 U. S. 677, 32 L. ed. 800, 9 Sup. Ct. 426; Bruett v. F. C. Austin Drainage Excavator Co., 174 Fed. 668; Carnegie v. Hulbert, 10 U. S. App. 454, 53 Fed. 10, 3 C. C. A. 391; Adams v. May, 27 Fed. 907; Metal Stamping Co. v. Crandall, Fed. Cas. No. 9493c; Phillips v. Holmes, 165 Ala. 250, 51 So. 625; Johnston v. First Nat. Bank, 145 Ala. 378, 40 So. 78; Simmons v. Titche, 102 Ala. 317, 14 So. 786; Reid v. McLeod, 20 Ala. 576; Harrison v. McCormick, 69 Cal. 616, 11 Pac. 456; Gilman v. Cosgrove, 22 Cal. 356; Roberts v. Rowan, 2 Harr. (Del.) 314; Richardson v. Smith, 21 Fla. 336; DeLeon v. Heller, 77 Ga. 740; Jones v. Watson, 63 Ga. 679; Hinman v. Andrews Opera Co., 49 Ill. App. 135; Page v. Brant, 18 Ill. 37; Pollock v. Dunning, 54 Ind. 115; Davis v. Hubbard, 4 Blackf. (Ind.) 50; Hughes v. Walker, 4 Blackf. (Ind.) 50; Percival v. Groff, 8 Blackf. (Ind.) 233; Armstrong v. Robinson, 5 Gill & J. (Md.) 412; Barber v. Smith, 41 Mich. 138, 1 N. W. 992; Smith v. Canfield, 8 Mich. 493; McCartey v. Kittrell, 55 Miss. 253; Blackwell v. Reid, 41 Miss. 102; Van Natta v. Harroun Real Estate Co., 221 Mo. 373, 120 S. W. 738; Revis v. Lamme, 2 Mo. 207; Mitchell v. Railton, 45 Mo. App. 273; Conrades v. Spink, 38 Mo. App. 309; Faulkner v. Whitaker, 15 N. J. L. 438; Crandall v. Denny, 2 N. J. L. 137; Bentley v. Smith, 3 Cai. (N. Y.) 170; Crawford v. Collins, 45 Barb. 269, 30 How. Pr. (N. Y.) 398; Smith v. Hoover, 39 Ohio St. 249; Haskins v. Alcott, 13 Ohio St. 210; Kamm v. Harker, 3 Ore. 208; Porter v. Cresson, 10 Serg. & R. (Pa.) 257; Martin v. Kelly, Cheves L. (S. Car.) 215; Harris v. Water & Light Co., 108 Tenn. 245, 67 S. W. 811; Marshall v. Hill, 8 Yerg. (Tenn.) 101; Frank v. Tatum, 87 Tex. 204, 25 S. W. 409; Western Grocery Co. v. Jata (Tex. Civ. App.), 173 S. W. 518; Style v. Lantrip (Tex. Civ. App.), 171 S. W. 786; Houston &c. R. Co. v. Corsicana Fruit Co. (Tex. Civ. App.), 170 S. W. 849; Law Reporting Co. v. Texas Grain &c. Co. (Tex. Civ. App.), 168 S. W. 1001; Western U. Tel. Co. v. Hirsch (Tex. Civ. App.), 84 S. W. 394; Kingsland & D. Mfg. Co. v. Mitchell (Tex. Civ.

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rendered for or against a partnership by the firm name, it has been reversed on appeal.[2] Some states, recognizing the firm entity, have, by statutory provision, expressly granted the right to sue in the firm name. The Ohio statute governing this question, which is typical of most statutes on the subject, is as follows: "A partnership formed for the purpose of carrying on a trade or business in this state, or holding property therein, may sue or be sued by the usual or ordinary name which it has assumed, or by which it is known; and in such case it is not necessary to allege or prove the names of the individual members thereof."[3] The states which have by statute adopted this rule have done so in opposition to the general rule, and the methods laid down in the statutes must be clearly followed, and the statutes strictly construed.[4] It has been held in some cases that the proper manner of pleading in such a case is to aver, in the body of the petition, the existence of the partnership, and that it is a partnership formed for the purpose of doing business in the state.[5] It is, however, also held that it is sufficient to describe the firm as "a firm doing business under that name in the state of ——" (naming the state), instead of stating that it was formed for the purpose, etc., the fact that it is actually doing business in the state, being the important matter to be considered.[6] The reason for this is plain, as a foreign partnership can

App.), 36 S. W. 757; Houghton v. Puryear, 10 Tex. Civ. App. 383, 30 S. W. 583; Behan v. Long (Tex. Civ. App.), 30 S. W. 380; Pate v. Bacon, 6 Munf. (Va.) 219; Olson v. Veazie, 9 Wash. 481, 37 Pac. 677, 43 Am. St. 855; King v. Harrison, 8 T. R. 508; Walker v. Rooke, 6 Q. B. D. 631, 50 L. J. Q. B. 470.

[2] Rhea v. Rawlings, 3 Cranch C. C. 256, Fed. Cas. No. 11737; Simmons v. Titche, 102 Ala. 317, 14 So. 786; Moore v. Burns, 60 Ala. 269; Lanford v. Patton, 44 Ala. 584; Reid v. McLeod, 20 Ala. 576; Day v. Cushman, 2 Ill. 475; Livingston v. Harvey, 10 Ind. 218; Tomlinson v. Burke, 10 N. J. L. 295; Burns v. Hall, 3 N. J. L. 984; McCredy v. Vanneman, 3 N. J. L. 870; Crandall v. Denny, 2 N. J. L. 137; Seely v. Schenck, 2 N. J. L. 71; Dunham v. Shindler, 17 Ore. 256, 20 Pac. 326.

[3] Gen. Code Ohio, § 11260.

[4] King v. Randlett, 33 Cal. 318; Haskins v. Alcott, 13 Ohio 210.

[5] Fryer v. Breeze, 16 Colo. 323, 26 Pac. 817; Beers v. Gurney, 14 Ohio Cir. Ct. 82. See also Kinkead's Code Pl. (2nd ed.), p. 1069.

[6] Globe Rolling Mill v. King, 13 Ohio Dec. 744, 2 Cin. S. C. R. 21. See also Chamberlain Bkg. House v. Noyes, 3 Nebr. 550, 92 N. W. 175.

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not sue by favor of the statute, but must sue in the individua names of the partners.[7]

§ 796. Plaintiff—General rule.—The general rule at com mon law is that in actions on partnership contracts, since thes are joint contracts, all persons who were partners at the time mus join as plaintiffs by their individual names.[8] In some states th rule has been changed by statute and partnerships may sue o be sued in the firm names.[9] In jurisdictions where suit ma

[7] Brownson v. Metcalfe, 1 Handy (Ohio) 188.

[8] Seymour v. Western R. Co., 106 U. S. 320, 27 L. ed. 103, 1 Sup. Ct. 123; Carne v. McLane, Fed. Cas. No. 2416, 1 Cranch (C. C.) 351; Simmons v. Titche, 102 Ala. 317, 14 So. 786; Garner v. Tiffany, Minor (Ala.) 167; Coleman v. Fisher, 67 Ark. 27, 53 S. W. 671; Molen v. Orr, 44 Ark. 488; Thompson v. McDonald, 84 Ga. 5, 10 S. E. 448; American Cent. R. Co. v. Miles, 52 Ill. 174; Snodgrass v. Broadwell, 2 Litt. (Ky.) 353; Creel v. Bell, 2 J. J. Marsh. (Ky.) 309; Dorr v. Jouet, 20 La. Ann. 27; Gallot v. McCluskey, 18 La. Ann. 259; Bumpus v. Turgeon, 98 Maine 550, 57 Atl. 883; White Mountain Bank v. West, 46 Maine 15; Day v. Swann, 13 Maine 165; Smith v. Crichton, 33 Md. 103; Armstrong v. Robinson, 5 Gill & J. (Md.) 412; May v. Western Union Tel. Co., 112 Mass. 90; Reed v. Hanover Branch R. Co., 105 Mass. 303; Halliday v. Doggett, 6 Pick. (Mass.) 359; Page v. Wolcott, 15 Gray (Mass.) 536; McDonnell v. Ford, 87 Mich. 198, 49 N. W. 545; Iroquois Mfg. Co. v. Annan-Burg Milling Co. (Mo. App.), 161 S. W. 320; Burlington &c. R. Co. v. Dick, 7 Nebr. 242; Tinkum v. O'Neale, 5 Nev. 93; Pearson v. Parker, 3 N. H. 366; Wright v. Williamson, 3 N. J. L. 532; Seely v. Schenck, 2 N. J. L. 71; Rosenber v. Block, 50 N. Y. Super. Ct. 357 Waterbury v. Head, 12 N. Y. S 361; Dob v. Halsey, 16 Johns. (N Y.) 34, 8 Am. Dec. 293; Brown v. Bostian, 6 Jones L. (N. Car.) 1 Wells v. Mitchell, 1 Ired. L., 23 N Car. 484, 35 Am. Dec. 757; Chotea v. Raitt, 20 Ohio 132; Wilson v. Wa lace, 8 Serg. & R. (Pa.) 53; Smith Walker, 6 S. Car. 169; Speake Prewitt, 6 Tex. 252; Amarillo Com mercial Co. v. Chicago, R. I. & Ry. Co. (Tex. Civ. App.), 140 S. W 377; Hines v. Dean, 1 White & W Civ. Cas. Ct. App. (Tex.) 690; D Wit v. Lander, 72 Wis. 120, 39 N W. 349; Miller v. Price, 20 Wis. 11 Moller v. Lambert, 2 Campb. 54 Teed v. Elworthy, 14 East 210.

[9] Illinois Cent. R. Co. v. Aver (Ala.), 67 So. 414; Levystein v. Ge son &c. Co., 147 Ala. 251, 41 S 774; Illinois Cent. R. Co. v. Kilgo 12 Ala. App. 358, 67 So. 707; Harris v. McCormick, 69 Cal. 616, 11 Pa 456; United States Express Co. Bedbury, 34 Ill. 459; Van Dyk Mosterdt (Iowa), 153 N. W. 20 Sweet v. Ervin, 54 Iowa 101, 6 N. W 156; Dimond v. Minnesota Sav. Ban 70 Minn. 298, 73 N. W. 182; Ga v. Townsend, 45 Minn. 357, 47 W. 1064; Leach v. Milburn Wag

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be commenced in the firm name, through statutory provision, the names of the individual partners are not necessary, yet, if a firm sues in the firm name in such jurisdictions, an allegation stating the individual names is immaterial and surplusage.[10] In those states which have not changed the general rule, and which do not thereby recognize the firm entity in this relation, it is necessary that each partner be made a party, either as plaintiff, or if he refuses to so join, then, under the codes, as defendant,[11] with certain exceptions, given in succeeding sections. Advantage may be taken by demurrer of the fact that a partnership sues by its firm name[12] if it appears on the face of the pleading that the suit is so brought;[13] or by motion to dismiss;[14] or plea in abatement.[15] The defect may be cured by amendment;[16] or

Co., 14 Nebr. 106, 15 N. W. 232; Burlington &c. R. Co. v. Dick, 7 Nebr. 242; Martin v. District Ct., 13 Nev. 85; Gillig v. Lake Bigler Road Co., 2 Nev. 214; Abernathy v. Latimore, 19 Ohio 286; Haskins v. Alcott, 13 Ohio St. 210; Beers v. Gurney, 7 Ohio Cir. Dec. 411; Rice v. Summers, 2 Pa. Dist. Rep. 31; Schweppe v. Wellauer, 71 Wis. 19, 45 N. W. 17; Noble v. Hudson, 20 Wyo. 227, 122 Pac. 901; O'Brien v. Foglesong, 3 Wyo. 57, 31 Pac. 1047; Ala. Code 1907, § 2506; Cal. Code Civ. Proc. 1909, § 388; Iowa Code 1897, § 3468; Mont. Rev. Codes 1907, § 6497; Cobbey's Consol. Stat. (Nebr.) 1903, § 1023; Bates Ann. Stat. (Ohio) (6 ed.), § 5011; Comp. Stat. 1910 (Wyo.), § 4329.

[10] Connecticut Fire Ins. Co. v. Carnahan, 63 Ohio 258, 58 N. E. 805.

[11] Hill v. Marsh, 46 Ind. 218; Pogson v. Owen, 3 Desaus. (S. Car.) 31; Hines v. Dean, 1 White & W. Civ. Cas. Ct. App. (Tex.), § 690; Noonan v. Orton, 31 Wis. 265.

[12] Pollock v. Dunning, 54 Ind. 115; Blackwell v. Reid, 41 Miss. 102; Bentley v. Smith, 3 Caines (N. Y.) 170; Weisz v. Davey, 28 Nebr. 566, 44 N. W. 470; Rogers v. Verlander, 30 W. Va. 619, 5 S. E. 487; Behan v. Long (Tex. Civ. App.), 30 S. W. 380.

[13] Morrison v. Tate, 1 Met. (Ky.) 569; Armstrong v. Robinson, 5 Gill & J. (Md.) 412; Brookmire v. Rosa, 34 Nebr. 227, 51 N. W. 480.

[14] Johnson v. First Nat. Bank, 145 Ala. 378, 40 So. 78; Davis v. Hubbard, 4 Blackf. (Ind.) 50; Hays v. Lanier, 3 Blackf. (Ind.) 322; Fox v. Blue Grass Grocery Co., 22 Ky. L. 1695, 61 S. W. 265; Mexican Mill v. Yellow Jacket Silver Min. Co., 4 Nev. 40, 97 Am. Dec. 510.

[15] Holland v. Butler, 5 Blackf. (Ind.) 255; Revis v. Lamme, 2 Mo. 207; Martin v. Kelly, Cheves (S. Car.) 215; Marshall v. Hill, 8 Yerg. (Tenn.) 101.

[16] Loewenberg v. Gilliam, 72 Ark. 314, 79 S. W. 1064; Morrison v. Tate, 1 Met. (Ky.) 569; Kleinert v. Knoop, 147 Mich. 387, 110 N. W. 941; Morgridge v. Stoefer, 14 N. Dak. 430, 104 N. W. 1112.

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waived by failure to object.[17] And it has been held that objection after judgment is too late,[18] for a judgment rendered in the firm name is not void, only irregular, nor is it subject to collateral attack.[19] However, this latter rule does not hold if service was defective, or all the partners did not appear to the action.[20] Although the firm name may be used, in the summons, it is sufficient when the names of the partners appear in the body of the complaint, or vice versa.[21] In Louisiana the suit should be in the firm name by the individual partners, naming them.[22] In all cases averments of the facts necessary to bring the case within the statute should be made in the pleading, in order to show capacity to sue, and if not so done, the pleading is demurrable.[23] At common

[17] Marget v. Wood, 3 Cranch (C. C.) 2, Fed. Cas. No. 9067; Foreman v. Weil, 98 Ala. 495, 12 So. 815; Moore v. Watts, 81 Ala. 261, 2 So. 278; Spaulding Mfg. Co. v. Godbold, 92 Ark. 63, 121 S. W. 1063, 29 L. R. A. (N. S.) 283; Gilman v. Cosgrove, 22 Cal. 356; Mitchell v. Railton, 45 Mo. App. 273. Conrades v. Spink, 38 Mo. App. 309; Daniels v. Roanoke R. & Lumber Co., 158 N. Car. 418, 74 S. E. 331; Brownson v. Metcalf, 1 Handy (Ohio) 188; Porter v. Cresson, 10 Serg. & R. (Pa.) 257; Easterwood v. Burnitt (Tex. Civ. App.), 126 S. W. 934.

[18] Namee v. Huffman, 3 Har. (Del.) 425; Cady v. Smith, 12 Nebr. 628, 12 N. W. 95; Justice v. Meeker, 30 Pa. Super. Ct. 207; Seitz v. Buffum, 14 Pa. St. 69; Pate v. Bacon, 6 Munf. (Va.) 219. Compare Opelika v. Daniel, 59 Ala. 211.

[19] Ives v. Muhlenburg, 135 Ill. App. 517; Mackenzie v. School Trustees, 72 Ind. 193; Livingston v. Harvey, 10 Ind. 218; Jones v. Martin, 5 Blackf. (Ind.) 351; Hays v. Lanier, 3 Blackf. (Ind.) 322; Smith v. Chenault, 48 Tex. 455; Corder v. Steiner (Tex. Civ. App.), 54 S. W. 277; Stephens v. Turner, 9 Tex. Civ. App. 623, 29 S. W. 937; Frisk v. Reigelman, 75 Wis. 499, 43 N. W. 1117, 44 N. W. 766, 17 Am. St. 198; Bennet v. Child, 19 Wis. 362, 88 Am. Dec. 692.

[20] Moses P. Johnson Machinery Co. v. Watson, 57 Mo. App. 629; Cobble v. Farmers' Bank, 63 Ohio St. 528, 59 N. E. 221; Perry-Rice Grocery Co. v. W. E. Craddock Grocery Co., 34 Tex. Civ. App. 442, 78 S. W. 966. Contra: Neiswanger v. Ord, 81 Kans. 63, 105 Pac. 17, 29 L. R. A. (N. S.) 287n.

[21] Greer v. Liipfert Scales Co., 15 Ala. 572, 47 So. 307; Hatcher v. Branch, 141 Ala. 410, 37 So. 690; Putman v. Wheeler, 65 Tex. 522; De Walt v. Zeigler, 9 Tex. Civ. App. 82, 29 S. W. 60.

[22] Wolf v. New Orleans Tailor Made Pants Co., 52 La. Ann. 1357, 27 So. 893.

[23] Burlington &c. R. Co. v. Dick, 7 Nebr. 242; Haskins v. Alcott, 1 Ohio 210; Sanders v. Keber, 28 Ohio St. 630.

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law nonjoinder of all partners as plaintiffs, in action ex contractu, may be raised as a ground of nonsuit because of variance;[24] or pleaded in abatement;[25] or if apparent on the face of the record, taken advantage of by demurrer, motion in arrest or error.[26] In tort the defect can be taken advantage of only by plea in abatement.[27] Under the codes nonjoinder of a partner as plaintiff should be raised by demurrer if apparent of record;[28] or if not so apparent, by answer;[29] else the objection is deemed waived.[30] Ordinarily one partner can not sue alone on a firm contract not executed in his own name.[31]

§ 797. Plaintiffs—Nominal partners.—The general rule is that one who is a nominal partner only, is not a real principal

[24] Jordan v. Wilkins, 3 Wash. (C. C.) 110, Fed. Cas. No. 7527; Caine v. McLane, 1 Cranch (C. C.) 351, Fed. Cas. No. 2416; Smith v. Hunt, 2 Stew. (Ala.) 222; Hicks v. Branton, 21 Ark. 186; Phillips v. Pennywit, 1 Ark. 59; Snell v. DeLand, 43 Ill. 323; Mitchell v. Dall, 2 Har. & G. (Md.) 159; Smith v. Crichton, 33 Md. 103; Halliday v. Dogget, 6 Pick. (Mass.) 359; Burlington &c. R. Co. v. Dick, 7 Nebr. 242; True v. Congdon, 44 N. H. 48; Chamberlin v. Hite, 5 Watts (Pa.) 373; Wilson v. Wallace, 8 Serg. & R. (Pa.) 53; Ball v. Strohecker, 2 Speers (S. Car.) 364; Hilliker v. Loop, 5 Vt. 116, 26 Am. Dec. 286.

[25] Garner v. Tiffany, Minor (Ala.) 167; Phillips v. Pennywit, 1 Ark. 59; Chamberlin v. Hite, 5 Watts (Pa.) 373; Hilliker v. Loop, 5 Vt. 116, 26 Am. Dec. 286.

[26] Smith v. Hunt, 2 Stew. (Ala.) 222; Hicks v. Branton, 21 Ark. 186; Burlington &c. R. Co. v. Dick, 7 Nebr. 242.

[27] True v. Congdon, 44 N. H. 48; Deal v. Bogue, 20 Pa. St. 228, 57 Am. Dec. 702; Story v. Richardson, 6 Bing. N. Cas. 123; Addison v. Overend, 6 T. R. 766.

[28] Gilman v. Cosgrove, 22 Cal. 356; Carico v. Moore, 4 Ind. App. 20, 29 N. E. 928; Boyd v. Platner, 5 Mont. 226, 2 Pac. 346; Green v. Lippincott, 53 How. Pr. (N. Y.) 33; Belshaw v. Colie, 1 E. D. Smith (N. Y.) 213; Gill v. Bickel, 10 Tex. Civ. App. 67, 30 S. W. 919.

[29] Karelsen v. Sun Fire Office, 45 Hun 144, 9 N. Y. St. 831; Dickinson v. Vanderpoel, 2 Hun (N. Y.) 626; Zabriskie v. Smith, 13 N. Y. 322, 64 Am. Dec. 551.

[30] Bibb v. Allen, 149 U. S. 481, 37 L. ed. 819, 13 Sup. Ct. 950; Molen v. Orr, 44 Ark. 486; Carico v. Moore, 4 Ind. App. 20, 29 N. E. 928; Conklin v. Fox, 3 Mont. 208; Parchen v. Peck, 2 Mont. 567; Abbe v. Clark, 31 Barb. (N. Y.) 238; Zabriskie v. Smith, 13 N. Y. 322, 64 Am. Dec. 551; Browning v. Marvin, 22 Hun (N. Y.) 547; Belshaw v. Colie, 1 E. D. Smith (N. Y.) 213; Clark v. Miller, 4 Wend. (N. Y.) 628; Caldwell v. Devinney, 4 Cin. Wkly. Law Bul. 117, 7 Ohio Dec. (Reprint) 599.

[31] Tallapoosa County Bank v. Sal-

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nor a real party in interest, and need not as such be joined as co-plaintiff, for although his name appears as a partner, he really takes no part in the partnership business or affairs, and has no real interest in the action, since he merely permits the use of his name.[32] However, a nominal partner may be a proper plaintiff, though not a necessary one in actions by the firm.[33]

§ 798. Plaintiffs—Dormant partners.—A dormant partner in a firm (aside from statute) need not be made a party plaintiff in a suit by ostensible partners in behalf of the firm, provided there was no privity of contract between him and the defendant,[34] unless, it has been held, he was the sole survivor,[35] the general rule being that the sole survivor of a partnership should, in such a case, commence the action as such surviving partner, and he need not join the representative of the deceased partner.[36] It is said the reason for the rule requiring partners to join as plaintiffs is to prevent judgments in favor of different partners in separate suits and this could not apply to dormant

mon, 12 Ala. App. 589, 68 So. 542; Roller v. McKinney, 159 N. Car. 319, 74 S. E. 966.

[32] Phillips v. Pennywit, 1 Ark. 59; Lasher v. Colton, 225 Ill. 234, 80 N. E. 22, 8 Ann. Cas. 367, note; Hatch v. Wood, 43 N. H. 633; Waite v. Dodge, 34 Vt. 181; Wetherill v. McCloskey, 28 W. Va. 195; Kell v. Nainby, 10 B. & C. 20, 21 E. C. L. 20; Harrison v. Fitzhenry, 3 Esp. 238; Glossop v. Colman, 1 Stark. 21, 2 E. C. L. 20; Teed v. Elworthy, 14 East 210; Spurr v. Cass, L. R. 5 Q. B. 656, 39 L. J. Q. B. 24, 23 L. T. 409. See also Cox v. Hubbard, 4 C. B. 317, 56 E. C. L. 317; Beudel v. Hettrick, 45 How. Pr. 198, 35 N. Y. Sup. Ct. 405; Parsons v. Crosby, 5 Esp. 199; Davenport v. Rackstrow, 1 C. & P. 89; 3 Bates Pl., Pr. & Forms, p. 2376.

[33] Phoenix Ins. Co. v. Hamilton, 14 Wall. (U. S.) 504, 20 L. ed. 729; Jones v. Howard, 53 Miss. 707.

[34] St. Mary's Bank v. St. John, 25 Ala. 566; McCabe v. Morrison, 2 Har. (Del.) 66; Council v. Teal, 122 Ga. 61, 49 S. E. 806; Goble v. Gale, 7 Blackf. (Ind.) 218, 41 Am. Dec. 219; Keane v. Fisher, 9 La. Ann. 70; Wood v. O'Kelley, 8 Cush. (Mass.) 406; Kenniston v. Ham, 29 N. H. 501; Clarkson v. Carter, 3 Cow. (N. Y.) 84; Clark v. Miller, 4 Wend. (N. Y.) 628; Wilkes v. Clark, 12 N. Car. 178; Choteau v. Raitt, 20 Ohio 132; Garrett v. Muller, 37 Tex. 589; Hilliker v. Loop, 5 Vt. 116, 26 Am. Dec. 286; Wetherill v. McCloskey, 28 W. Va. 195; Leveck v. Shaftoe, 2 Esp. 468; Bates Partnership, § 1022; Chitty Pl. (14 ed.), pp. 11, 12.

[35] Beach v. Hayward, 10 Ohio 455.

[36] Daly v. Ericsson, 45 N. Y. 786; Beach v. Hayward, 10 Ohio 455.

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partners, where the persons sued dealt only with the ostensible partners.[37] But if the defendant knew a dormant partner was interested in the subject-matter of the suit, he should be joined.[38] As to whether, under the codes, a dormant partner must be joined, may depend upon the provision of the code, if there is any, and it has been decided both ways, most cases probably holding that the dormant partner need not be joined,[39] though it has been held that, under the code, he must be joined.[40] Although not a necessary party plaintiff in an action by a partnership, a dormant partner is not an improper party, and may join with the ostensible partners.[41]

§ 799. **Plaintiffs—Wrongdoing partner.**—An exception has also been made by some courts, where the partner whose nonjoinder is in question, has been guilty of an act in fraud of his partners, which fraudulent act is in controversy in the suit. This would virtually be seeking to repudiate his own act, if he should appear as plaintiff. However, Mr. Bates says[42] that, many courts permit all the partners to join as plaintiffs, on the ground that the transaction is a nullity and the title is still in the firm, but also states that the defrauded partner, while he could not sue alone at law, could do so at equity. And, there are decisions to the effect that, where one partner fraudulently sells all the property of the firm to a third party, the defrauded partner may sue the third party for reimbursement without making his wrongdoing partner a party to the suit.[43]

[37] Anderson v. Martindale, 1 East 497; Collyer Partnership (1861 ed.), § 633.

[38] Bird v. Fake, 1 Pin. (Wis.) 290. Contra: Monroe v. Ezzell, 11 Ala. 603.

[39] Howe v. Savory, 49 Barb. 403, 51 N. Y. 631; Keesy v. Old, 3 Tex. Civ. App. 1, 21 S. W. 693.

[40] Secor v. Keller, 4 Duer (N. Y.) 416.

[41] Desha v. Holland, 12 Ala. 513, 46 Am. Dec. 261; Wright v. Herrick, 125 Mass. 154; Emerson v. Baylies, 19 Pick. (Mass.) 55; Beach v. Hayward, 10 Ohio 455; Rogers v. Kichline, 36 Pa. St. 293; Hilliker v. Loop, 5 Vt. 116, 26 Am. Dec. 286; Garrett v. Muller, 37 Tex. 589; Waite v. Dodge, 34 Vt. 181; Cothway v. Fennell, 10 B. & C. 671.

[42] Bates Partnership, §§ 1038, 1039.

[43] Hogendobler v. Lyon, 12 Kans. 276; Doll v. Hennessy Merc. Co., 33 Mont. 80, 81 Pac. 625.

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§ 800. Collusion of third parties and partners.—One o the first things which every partner has a right to expect fro third parties, is good faith in all transactions involving th firm or the members thereof. The mere fact that one o more of the partners approve or assent to the acts of th third party will not make against the partnership or the non assenting members, if the acts are in fraud of them, and collu sion therein is shown between the assenting partners and th third party. Even where the partners gave one member of th firm authority to collect a debt, and there was a collusive settle ment between the firm debtor and this partner, such settlemen will not bind the firm.[44] A Kentucky case illustrates the poin very clearly. An insurance company was unable to agree upo a settlement with a firm for loss occasioned by fire, under a insurance policy of such company. The agent of the insuranc company thereupon commenced secret negotiations with on partner who was hostile to his copartners, and made settlement with him for a much smaller amount than the a torneys for the firm had offered to accept, and received a releas from this partner, to which release the firm name was signe The other partners thereupon sued the insurance company, fo the sum due them under the policy, and the court held that th other partners were not bound by the release, nor were the chargeable with any part of the sum received by the releasin partner, the evidence showing that he had appropriated the su so received to his own use, to the exclusion of his copartners. The element of lack of good faith in the third party, howeve must be present, as a rule, to make the transaction fall with the foregoing principle, and a partner in a trading partnersh may enter into any contract for the firm in its ordinary trade an business; and, as between the firm and those dealing with it good faith, it is not material whether such partner is acting fair with his copartners, so long as he is within the scope of th

[44] Loftus v. Ivy, 14 Tex. Civ. App. 701, 37 S. W. 766.

[45] Phoenix Ins. Co. v. Miller, Ky. L. (abstract) 464.

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firm's business.[46] A somewhat different rule has been adopted in Arkansas. In Busby v. Rooks,[47] a partner settled a claim of the firm against the debtor for a sum considerably less than was due, the partner acting fraudulently and without authority or consideration. He retained one-half of the amount so recovered, and deposited the other half in a bank to the credit of his partner. Thereafter the firm sued to recover the bill, and the court, in deciding the case held that the defendant was entitled to a credit for the sum paid the partner, who was not entitled to recover anything, and that the other partner was entitled to half of the remainder of the debt. As to what constitutes collusion or lack of good faith, it can simply be said that each individual case must be judged by itself, and no hard and fast rule can be applied. It might, perhaps, be said that only actual assistance in or knowledge of the fraud of the partner by the debtor, or at least such facts existing as would of themselves imply knowledge, would show his lack of good faith, and even this, it seems, would not adequately control the question. The difficulty appears in deciding just what amounts to such waiver. One decision seems almost to require actual notice of the fraud, holding that a partner, in executing a chattel mortgage in the name of the firm to secure its debts, increased the amount so as to cover his individual debts, does not conclusively render it fraudulent, but it will be a lien only to the amount of the firm debt.[48]

§ 801. **One partner suing for all.**—Some states have provided by statute that one partner may sue for and in behalf of all when they are too numerous to bring upon the record. Under such a statute it has been held that the managing partner of a firm of over forty members, residing in different counties, can not sue for all,[49] but that if the number of partners is large,

[46] Salt Lake Brew. Co. v. Hawke, 24 Utah 199, 66 Pac. 1058. See also Dietz v. Regnier, 27 Kans. 94; Willson v. Whaley, 7 Ky. Law (abstract) 527.

[47] 72 Ark. 657, 81 S. W. 1056.

[48] Rock v. Collins, 99 Wis. 630, 75 N. W. 426.

[49] Brainerd v. Bertram, 5 Abb. N. Cas. (N. Y.) 102.

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as in the case of an unincorporated joint stock company in which frequent changes by death or transfer of shares may occur, one may sue for all, and that the caption need only be in the name of the plaintiff.[50]

§ 802. Action on contract made in name of one partner.—Where a contract is made by one partner for the firm which shows on its face it is a firm transaction, all partners must join in action thereon.[51] The same rule holds whereby a transaction was had through which an implied contract with the firm arose, as by the sale of firm goods.[52] Where there was a transaction in one partner's name for the firm benefit, in which the firm was not disclosed as a principal, then, under the rules of agency, the one partner in whose name the contract was made may sue as plaintiff,[53] or all the partners may join in the action,[54] or in jurisdictions where the statute permits suits in the firm name,

[50] Platt v. Colvin, 50 Ohio St. 703, 36 N. E. 735.

[51] Creel v. Bell, 2 J. J. Marsh. (Ky.) 309; White Mountain Bank v. West, 46 Maine 15; Wiley v. Logan, 95 N. Car. 358; Wilson v. Wallace, 8 Serg. & R. (Pa.) 53; Sawyer v. Worthington, 28 Vt. 733; Robbins v. Deverill, 20 Wis. 142; DeWit v. Lander, 72 Wis. 120, 39 N. W. 349; Badger v. Daenicke, 56 Wis. 678, 14 N. W. 821.

[52] Bennett v. Scott, 1 Cranch (C. C.) 339, Fed. Cas. No. 1323; Stevens v. Lunt, 19 Maine 70; Badger v. Daenicke, 56 Wis. 678, 14 N. W. 821; Garrett v. Handley, 3 B. & C. 462, 10 E. C. L. 462. But see Driver v. Burton, 17 Q. B. 989, 79 E. C. L. 989, 21 L. J. Q. B. 157; Halliday v. Doggett, 6 Pick. (Mass.) 359; Gilbert v. Lichtenberg, 98 Mich. 417, 57 N. W. 259; Speake v. Prewitt, 6 Tex. 252. See also Wilson v. Wallace, 8 Serg. & R. (Pa.) 53.

[53] Ewing v. French, 1 Blackf. (Ind.) 353; New York Mut. F. Ins. Co. v. Hammond, 106 Ky. 386, 50 S. W. 545, 20 Ky. L. 1944; Trott v. Irish, 1 Allen (Mass.) 481. But compare Halliday v. Doggett, 6 Pick. (Mass.) 359; Simpson v. Baker, 2 Black. (U. S.) 581, 17 L. ed. 263; Hilliker v. Francisco, 65 Mo. 598; Taylor v. The Robert Campbell, 20 Mo. 254; Missouri Pac. R. Co. v. Smith, 84 Tex. 348, 19 S. W. 509; Gill v. Bickel, 10 Tex. Civ. App. 67, 30 S. W. 919; Curtis v. Belknap, 21 Vt. 433; Driver v. Burton, 17 Q. B. 989, 21 L. J. Q. B. 157, 79 E. C. L. 989; Lomas v. Bradshaw, 9 C. B. 620, 19 L. J. C. P. 273, 67 E. C. L. 620.

[54] Bennett v. Scott, 1 Cranch C. C. 339, Fed. Cas. No. 1323; Havana &c. R. Co. v. Walsh, 85 Ill. 58; Illinois Cent. R. Co. v. Owens, 53 Ill. 391; Ward v. Leviston, 7 Blackf. (Ind.) 466; Gilbert v. Lichtenberg, 98 Mich. 417, 57 N. W. 259; Schnader v. Schnader, 26 Pa. St. 384; Chamberlin v. Hite, 5 Watts (Pa.) 373; Badger v.

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the partnership may sue on such contract in its own name.[55] There was no defect in parties in a suit by an individual plaintiff on a claim in which, as he testified, his firm was interested, while the defendant answered and testified that the contract was with plaintiff individually.[56] A note and mortgage taken by one partner to secure a debt due to the partnership may be enforced by such partner in his own name.[57]

§ 803. **Plaintiffs where contract assigned.**—If one partner makes an assignment of his individual estate, the assignee must join with the other partners in firm actions, as tenants in common.[58] At common law a partner can not sue in his own name, where a partnership claim was assigned to him,[59] although he may in case of a negotiable note assigned by indorsement in the firm name.[60] At common law the partner to whom a firm claim is assigned may sue in the name of the assignor.[61] Under the codes which require an action to be brought by the real party in interest a partner who is the assignee of a firm claim may sue in his own name.[62] Some codes require the as-

Daenicke, 56 Wis. 678, 14 N. W. 821; Skinner v. Stocks, 4 B. & Ald. 437, 23 Rev. Rep. 337, 6 E. C. L. 550.

[55] Hardy v. Jones, 13 Ga. App. 457, 79 S. E. 246.

[56] Bryant v. Phillips, 189 Mo. App. 278, 176 S. W. 294.

[57] Lundburg v. Northwestern Elevator Co., 42 Minn. 37, 43 N. W. 685.

[58] Pugh v. Holliday, 3 Ohio St. 284.

[59] Howell v. Reynolds, 12 Ala. 128; Molen v. Orr, 44 Ark. 486; Dougherty v. Smith, 4 Met. (Ky.) 279; Lunt v. Stephens, 24 Maine 534; Russell v. Swan, 16 Mass. 314; Tate v. Citizens' Mut. F. Ins. Co., 13 Gray (Mass.) 79; Busfield v. Wheeler, 14 Allen (Mass.) 139; Burnham v. Whittier, 5 N. H. 334; Kirby v. Cogswell, 1 Caines (N. Y.) 505, Colem. & C. Cas. 320; Gaither v. Caldwell, 21 N. Car. 504; Mosgrove v. Golden, 101 Pa. St. 605; Horbach v. Huey, 4 Watts (Pa.) 455; De Groot v. Darby, 7 Rich. L. (S. Car.) 118; Brougham v. Balfour, 3 U. C. C. P. 72.

[60] American Cent. R. Co. v. Miles, 52 Ill. 174; Dorr v. Jouet, 20 La. Ann. 27; Russell v. Swan, 16 Mass. 314; Estabrook v. Smith, 6 Gray (Mass.) 570, 66 Am. Dec. 443; Burnham v. Whittier, 5 N. H. 334; Kirby v. Cogswell, 1 Caines (N. Y.) 505, Colem. & C. Cas. 320; Manegold v. Dulau, 30 Wis. 541.

[61] Lunt v. Stevens, 24 Maine 534; Busfield v. Wheeler, 14 Allen (Mass.) 139.

[62] Pacific Mut. L. Ins. Co. v. Fisher, 109 Cal. 566; Walker v. Steele, 9 Colo. 388, 12 Pac. 423; Carroll v. Campbell, 110 Mo. 557, 19 S. W. 809; Farwell v. Davis, 66 Barb. (N. Y.) 73; Mansfield v. New York Cent. &c.

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signee to be made a party defendant to answer to his interest.[63] It has been held that where one partner assigned his interest in the firm to the other, the remaining copartner may maintain in his own name an action on a firm contract even though a certificate of the firm name and members had not been filed as required by statute.[64]

§ 804. Surviving partner as plaintiff.—A surviving partner, in the absence of statutory action abrogating or restricting the right, has the power to sue upon partnership claims, and he need not join the personal representative of the deceased partner,[65] but he must commence the suit as such surviving partner, and not in his own right.[66] In order to so sue, the surviving partner should show, in his petition, that he is such surviving partner, and it has been held that it is sufficient for him to aver that a note sued upon was made and delivered to him as such surviving partner, in the firm name, in order to maintain such action.[67] A Texas case[68] holds that in case both partners should die, and the administrators of both were allowed to be substituted

R. Co., 102 N. Y. 205, 6 N. E. 386; West v. Citizens' Ins. Co., 27 Ohio St. 1, 22 Am. Rep. 294; Viles v. Bangs, 36 Wis. 131.

[63] Swails v. Coverdill, 17 Ind. 337. See also Dougherty v. Smith, 4 Met. (Ky.) 279.

[64] McFadden v. Shanley, 16 Ariz. 91, 141 Pac. 732.

[65] Pagan v. Sparks, 2 Wash. (C. C.) 325, Fed. Cas. No. 10659; Kirby v. Lake Shore & M. S. R. Co., 8 Fed. 462; Nicklaus v. Dahn, 63 Ind. 87; Brown v. Allen, 35 Iowa 306; McCandless v. Hadden, 48 Ky. (9 B. Mon.) 186; Matherson v. Wilkinson, 79 Maine 159, 8 Atl. 684; Clark v. Howe, 23 Maine (10 Shep.) 560; Austin v. Walsh, 2 Mass. 401; Peters v. Davis, 7 Mass. 257; Cragin v. Gardner, 64 Mich. 399, 31 N. W. 206; Teller v. Wetherell, 9 Mich. 464; Hargadine v. Gibbons, 114 Mo. 561, 21 S. W. 726; Hargadine v. Gibbons, 45 Mo. App. 460; Boyd v. Webster, 58 N. H. 336; Daby v. Ericsson, 45 N. Y. 786; Felton v. Reid, 52 N. Car. 269; Beach v. Hayward, 10 Ohio 445; Hawkins v. Capron, 17 R. I. 679, 24 Atl. 466; Dial v. Agnew, 28 S. Car. 454, 6 S. E. 295; Watson v. Miller, 55 Tex. 289. In Louisiana the rule seems to be different. Norris v. Ogden, 11 Mart. (O. S.) (La.) 455; Connelly v. Cheevers, 16 La. 30; Flower v. O'Conner, 7 La. 194; Crozier v. Hodge, 3 La. 357; Notrebe v. McKinney, 6 Rob. (La.) 13; Lockhart v. Harrell, 6 La. Ann. 530.

[66] Reeder v. Sayre, 6 Hun (N. Y.) 562 (affd. 70 N. Y. 180, 26 Am. Rep. 567).

[67] Manning v. Smith, 16 Nev. 85.

[68] Blackman v. Green, 17 Tex. 322.

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as joint plaintiff, without objection, or suggestion as to which died first, that this joinder was proper. The proper and general rule is, however, that the administrator of the last survivor should administer the estate, without the joinder of the administrators of the other partners.[69] This, however, applies to personal property, and not to real estate as to which the survivors and heirs become tenants in common.[70] If a partner dies while an action by himself and a copartner is pending, the action must be prosecuted by the surviving partner alone.[71]

§ 805. Plaintiffs in tort actions.—In general, all partners must join as plaintiffs in suing for damages for a tort which has resulted in injury to the firm.[72] If the tort causes individual damage to a partner he may sue alone for such damages, but in such action can not recover damages sustained by the firm.[73] Thus where the same tort occasions damage to the firm and individual damage to the individual partners, there may be two or more causes of action, one in favor of all the partners jointly and one in favor of each partner who sustained individual damages.[74] In an action for the conversion of part-

[69] 1 Bates Pl. Part. and Forms, pp. 55, 56.

[70] Rammelsberg v. Mitchell, 29 Ohio St. 22.

[71] Hathaway v. Stone, 215 Mass. 212, 102 N. E. 461.

[72] Donnell v. Jones, 13 Ala. 490, 48 Am. Dec. 59; Hughes v. Boring, 16 Cal. 81; Leavet v. Sherman, 1 Root (Conn.) 159; Bates v. Forsyth, 69 Ga. 365; Gannett v. Cunningham, 34 Maine 56; Robinson v. Mansfield, 13 Pick. (Mass.) 139; Medbury v. Watson, 6 Metc. (Mass.) 246, 39 Am. Dec. 726; Haynes v. Knowles, 36 Mich. 407; Bigelow v. Reynolds, 68 Mich. 344, 36 N. W. 95; Peaks v. Graves, 25 Nebr. 235, 41 N. W. 151; Newman v. Bean, 21 N. H. 93; Farrel v. Colwell, 30 N. J. L. 123; Saul v. Kruger, 9 How. Prac. (N. Y.) 569; Taylor v. Church, 1 E. D. Smith (N. Y.) 279 (revg. 8 N. Y. 452, Seld. notes 126); Little v. Hamilton, 61 N. Car. 29; McPherson v. Pemberton, 46 N. Car. 378; Barker v. Abbott, 2 Tex. Civ. App. 147, 21 S. W. 72; Farnum v. Ewell, 59 Vt. 327, 10 Atl. 527; Story v. Richardson, 6 Bing. N. Cas. 123, 37 E. C. L. 123; Addison v. Overend, 6 T. R. 766.

[73] Robinson v. Mansfield, 13 Pick. (Mass.) 139; Rogers v. Raynor, 102 Mich. 473, 60 N. W. 980; Coggshall v. Munger, 54 Mo. App. 420; Calkins v. Smith, 48 N. Y. 614, 8 Am. Rep. 575; Story v. Richardson, 6 Bing. N. Cas. 123.

[74] Leavet v. Sherman, 1 Root (Conn.) 159; Duffy v. Gray, 52 Mo. 528; Haythorn v. Lawson, 3 C. & P. 196; Forster v. Lawson, 3 Bing. 452.

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nership property, it has been held that one partner can not recover to the exclusion of the others.[75] Where a libel is published concerning a partnership business it has been held that all the partners may join in one suit for their damages by reason thereof, or any partner may sue thereon for his separate damage.[76] Where an article libels both a partnership and its individual members, damages to the partnership must be recovered by the partners jointly and damages to the partners individually, by them separately.[77] But it is held that partners may sue as a partnership for an injury to the business caused by an assault upon the partners.[78] Judge Story says:[79] "There is not the slightest doubt that a joint action may be maintained by the firm for any defamation of the firm, or for any libel upon the firm; for this is, justly and properly speaking, a joint tort and injury, applicable to their collective rights and interests. But in such a case the damages must be strictly limited to the injury sustained by the firm in their joint trade or business; and can not be extended to the injury done to the private feelings of the individual partners. The same principle will apply to any other wrong, done by third persons, affecting the partnership trade or business; such as obstructing their business and employment, seducing persons from their service, or wrongfully soliciting and inducing their customers to withdraw their patronage from them by fraud, threats, or otherwise; for in all such cases a joint damage is done to the firm."

§ 806. Defendants in action against partnership—In general.—Owing to the diversified and somewhat unsettled rules of law in the various jurisdictions, as to the question of entity in partnership law, the question of proper defendants in a partnership action likewise varies much in different jurisdictions.

Compare Houghton v. Puryear, 10 Tex. Civ. App. 383, 30 S. W. 583.

[75] Edwards v. Hatfield, 93 Nebr. 712, 141 N. W. 1020.

[76] Wills v. Jones, 13 App. D. C. 482.

[77] Collier v. Postum Cereal Co., 150 App. Div. 169, 134 N. Y. S. 847.

[78] Seidell v. Taylor (Wash.), 151 Pac. 41.

[79] Story Partnership, §§ 257, 258.

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The old English law avoided, as much as possible, recognition of the principle of legal entity in a partnership, and required the suit to be commenced against the individual partners. The Scotch law, on the contrary, recognized the legal entity of a partnership, and allowed actions in the firm name.[80] The Scotch rule was adopted, however, at least partially, in England, by the rules of the Supreme Court as early as 1883, when it was provided that any two or more persons claiming or being liable as copartners may sue or be sued in the name of the firms of which they were members when the cause of action accrued; and provision is made for the discovery of the individuals so suing or being sued.[81] Mr. Lindley says:[82] "With reference to this last rule, it is to be observed that the firm's name, when used in any action, is merely a convenient method of expressing the names of those who constituted the firm when the cause of action accrued. The rule does not incorporate the firm; so that if A is a creditor of a firm, B, C, and D, and D retires and E takes his place, and the name of the firm remains unchanged, A can not maintain an action against B, C & E, in the name of the firm, unless B, C & E have become or are content to be treated as his debtors. In the case supposed, an action against the firm would mean an action against B, C & D, i. e., A's real debtors." Ord. 16, r. 14, further provided that, if an action be brought against a firm, which the plaintiff knows has been dissolved before the commencement of the action, the writ must be served upon all the persons sought to be made liable. If, however, there should have been a change in the membership of the firm, unknown to the plaintiff, and not discovered until after judgment, it might, upon execution, give rise to serious difficulties.[83] In this country there is no uniform rule as to the proper parties defendant. Many states follow the common-law rule, and do not allow the partners to be sued in the firm name. Under this rule, since partnership liability in contract is joint, all ostensible partners must be joined as defendants,[84] even if some of them are nonresi-

[80] English Partnership Act, 1890, § 4.
[81] Ord. 16, n. 14, 15.
[82] Lindley Partnership, p. 265.
[83] Munster v. Cox, 10 App. Cas. 680.
[84] Barry v. Foyles, 1 Pet. (U. S.)

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dents.[85] The court said in a leading case:[86] "I think, then, tha I am authorized in saying, that in case of joint debtors, they must be jointly sued; that if a less number than the whole b sued, that is matter which can be pleaded in abatement only that it is necessary to show a joint subsisting indebtedness i all the defendants; and, in cases of assumpsit, it is necessar to show a subsisting liability on the part of all the defendant as promisors, with the exceptions already mentioned; and tha where as respects any of the defendants, the right of action i gone or suspended, the joint liability being at an end, the othe defendants may avail themselves of this suspension or discharg whether it be produced by the act of the party or by operatio of law, at the instance and by the act of the creditor." In state where the liability of partners is joint and several, the actio may be brought against any one or more partners.[87] In sev eral states statutory regulations permit suit against a partnershi by the firm name. For example, Ohio has provided that "A par nership formed for the purpose of carrying on a trade or bus ness in this state, or holding property therein, may sue or b sued by the usual or ordinary name which it has assumed, o by which it is known; and in such case it shall not be nece sary to allege or prove the names of the individual membe

311, 7 L. ed. 157; Adams v. May, 27 Fed. 907; Harrison v. McCormick, 69 Cal. 616, 11 Pac. 456; Butler v. Delafield, 1 Cal. App. 367, 82 Pac. 260; Martyn v. Arnold, 36 Fla. 446, 18 So. 791; Sandusky v. Sidwell, 173 Ill. 493, 50 N. E. 1003; Pettis v. Atkins, 60 Ill. 454; Livingstone v. Harvey, 10 Ind. 218; Heavrin v. Lack Malleable Iron Co., 153 Ky. 329, 155 S. W. 729; Fox v. Blue Grass Grocery Co., 22 Ky. L. 169, 61 S. W. 265; Key v. Box, 14 La. Ann. 497; Smith v. Cooke, 31 Md. 174, 100 Am. Dec. 58; Whittaker v. Collins, 34 Minn. 299, 25 N. W. 632, 57 Am. Rep. 55; Faulkner v. Whitaker, 15 N. J. L. 438; Robertson v. Smith, 18 Johns. (N. Y.) 459, 9 Am. Dec. 227; Cox v. Gille Hardwa &c. Co., 8 Okla. 483, 58 Pac. 64 Taby v. McMurray, 30 Okla. 602, 1 Pac. 664; Kamm v. Harker, 3 O 208; Alexander v. McGinn, 3 Wa (Pa.) 220; Nathanson v. Spetz, R. I. 70, 31 Atl. 690; Davis v. Will 47 Tex. 154; Biggs v. Lee (Tex. C App.), 137 S. W. 138; Lewis v. Cra 78 Vt. 216, 62 Atl. 60; Pierson Robinson, 3 Swanst. 139n.

[85] Wiley v. Sledge, 8 Ga. 53 Boorum v. Ray, 72 Ind. 151.

[86] Robertson v. Smith, 18 Johns. (Y.) 459, 9 Am. Dec. 227.

[87] Clark v. Jones, 87 Ala. 474, 6 S 362; Green v. Pyne, 1 Ala. 235; Hic v. Maness, 19 Ark. 701; Ryerson

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thereof."[88] Another Ohio statute[89] provides that: "Except as otherwise provided in the next section, every partnership transacting business in this state under a fictitious name, or a designation not showing the names of the persons interested as partners in such business, must file with the clerk of the court of common pleas of the county in which its principal office or place of business is situated, a certificate to be indexed by said clerk stating the names in full of all the members of such partnership and their places of residence." Commercial or mercantile partnerships outside of the United States "are excepted from the above by the next section. It is also provided in the act that, until such fictitious partners are so registered as provided in the act, they shall not commence such action."[90] In Iowa, it has been held that a partnership may be sued in its firm name, but that the code renders a scire facias necessary, in order to reach individual property.[91] And it is likewise held in the same state that a partnership may be sued in the individual names of the partners as well as in the partnership name.[92] In Alabama the code allows suit against a partnership in the firm name,[93] and a judgment against a firm, in the firm name, will support an action against any individual partner therein, to enforce his individual liability for the firm debts.[94] Under the attachment law of Illinois, the suit may also be commenced against a partnership in the firm name.[95] In states which have, by statutory enactment, made provision for the manner of commencing such suits, the question is settled, provided that the provisions of the statutes cover fully the point, but, wherever there are any restric-

Hendrie, 22 Iowa 480; Miller v. Northern Bank, 34 Miss. 412; Putnam v. Ross, 55 Mo. 116; Curran v. W. W. Kendall Co., 8 N. Mex. 417, 45 Pac. 1120; Logan v. Wallis, 76 N. Car. 416; Gratz v. Stump, Cooke (Tenn.) 494; People's Nat. Bank v. Hall, 76 Vt. 280, 56 Atl. 1012.

[88] Ohio Rev. Stat., § 5011.

[89] Ohio Rev. Stat., §§ 3170, 3171.

[90] Ohio Rev. Stat., §§ 3170, 3176.

[91] Levally v. Ellis, 13 Iowa 544; Davis v. Buchanan, 12 Iowa 575.

[92] Markham v. Buckingham, 21 Iowa 494, 89 Am. Dec. 590.

[93] Alabama Code, § 2904.

[94] Cox v. Harris, 48 Ala. 538; J. R. Kilgore & Son v. Shannon & Co., 6 Ala. App. 537, 60 So. 520.

[95] United States Exp. Co. v. Bedbury, 34 Ill. 459.

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tions or conditions imposed by the statute, these restrictions o conditions must be strictly carried out. In Minnesota it ha been held that the complaint should allege the partnership.[9] There are other states than those mentioned, in which a part nership may be made a defendant by its firm name.[97] An excep tion of misjoinder of parties will be sustained where a clain against a firm is cumulated with a claim against a partner in different transaction.[98] It was immaterial, where process serve on the members showed that the suit was against the firm, tha a partnership was not specifically made a party after an amend ment setting up that the members individually sued constitute the firm.[99]

§ 807. Defendants—Wife—Dower interest.—In deter mining the right of a partner's wife to dower in certain prop erty, it is first necessary to ascertain whether the property i the individual property of the husband, or the property of th firm. Consequently, the wife is a necessary party to a com plete determination of the cause, where an action is commence to dissolve a partnership, where there is real property, and ther is a question whether the real property is a homestead of th husband or an asset of the firm.[1] If the realty is in fact a home stead of the husband and is so retained, and not interfered with she retains her dower therein, regardless of the outcome of th suit otherwise, and she has no interest in the affairs of the par nership such as would make her a necessary party. If, on th contrary, realty has been converted out and out into assets, lien creditor foreclosing, need not make the wife a party the suit.[2]

§ 808. Defendants—Representatives of deceased partne —Generally, actions at law to enforce obligations of a par

[96] Foerster v. Kirkpatrick, 2 Minn. 210.

[97] Asbestos Mfg. & Supply Co. v. Lennig-Rapple Engineering Co., 26 Cal. App. 177, 146 Pac. 188.

[98] Darden v. Garrett, 130 La. 998, 58 So. 857.

[99] Heyman v. Decatur Street Ba (Ga. App.), 84 S. E. 483.

[1] Rhodes v. Williams, 12 Nev.

[2] Harrington v. Johnson, 10 Wa 542, 39 Pac. 141. See ante § 296.

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nership must be brought against the surviving partner alone.[3] Except when modified by statutory enactment, contract liabilities descend to the survivors, and, in case of the death of all the partners, then to the administrator or executor of the last survivor.[4] The administrator of a partner, other than of the last survivor, if all are deceased, is not a necessary party, unless an attempt is made to reach the partner's separate property,[5] and a suit for fraud of a partnership is governed by the same rules

[3] Bischoffsheim v. Baltzer, 20 Fed. 890; Dixon v. Barclay, 22 Ala. 370; Stillwell v. Gray, 17 Ark. 473; West Coast Lumber Co. v. Apfield, 86 Cal. 335, 24 Pac. 993; Smith v. Salomon, 1 Colo. 176, 91 Am. Dec. 711; Vandenheuvel v. Storrs, 3 Conn. 203; Bennett v. Woolfolk, 15 Ga. 213; Belton v. Fisher, 44 Ill. 32; McIntosh v. Zaring, 150 Ind. 301, 49 N. E. 164; Childs v. Hyde, 10 Iowa 294, 77 Am. Dec. 113; Broadfoot v. Rowe, 14 Ky. L. 895; Southard v. Lewis, 4 Dana (Ky.) 148; Strang v. Hirst, 61 Maine 9; Harwood v. Jones, 10 Gill & J. (Md.) 404, 32 Am. Dec. 180; Stafford v. Gold, 9 Pick. (Mass.) 533; Peters v. Davis, 7 Mass. 257; Van Kleeck v. McCabe, 87 Mich. 599, 49 N. W. 872, 24 Am. St. 182; O'Connell v. Schwanabeck, 76 Mich. 517, 43 N. W. 599; Bassett v. Miller, 39 Mich. 133; Freeman v. Stewart, 41 Miss. 138; Hunt v. Drane, 32 Miss. 243; Bredow v. Mutual Sav. Inst., 28 Mo. 181; Parchen v. Peck, 2 Mont. 567; Union Pacific R. Co. v. Metcalf, 50 Nebr. 452, 69 N. W. 961; Maples v. Geller, 1 Nev. 233; Ledden v. Colby, 14 N. H. 33, 40 Am. Dec. 173; Joyslin v. Taylor, 24 N. H. 268; Rusling v. Brodhead, 55 N. J. Eq. 200; Secor v. Pendleton, 47 Hun (N. Y.) 281, 13 N. Y. St. 387; Farwell v. Davis, 66 Barb. (N. Y.) 73; Voohis v. Childs, 17 N. Y. 354; Felton v. Reid, 52 N. Car. 269; Poppleton v. Jones, 42 Ore. 24, 69 Pac. 919; Hoskinson v. Eliot, 62 Pa. 393; Hawkins v. Capron, 17 R. I. 679, 24 Atl. 466; Kinsler v. McCants, 4 Rich. L. (S. Car.) 46; Trundle v. Edwards, 4 Sneed (Tenn.) 572; Lovelady v. Bennett (Tex. Civ. App.), 30 S. W. 1124; Watson v. Miller, 55 Tex. 289; Gaut v. Reed, 24 Tex. 46, 76 Am. Dec. 94; Wood v. Rutland &c. Mut. Fire Ins. Co., 31 Vt. 565; Brighan-Hopkins Co. v. Gross, 30 Wash. 277, 70 Pac. 480; Barlow v. Coggan, 1 Wash. 257; Shields v. Fuller, 4 Wis. 102, 65 Am. Dec. 293; Bolckow v. Foster, 24 Grant's Ch. (U. C.) 333.

[4] Costley v. Wilkerson, 49 Ala. 210; Whitney v. Cook, 5 Mass. 139; Copes v. Fultz, 1 Smed. & M. (Miss.) 623; Nehrboss v. Bliss, 88 N. Y. 600, 2 Civ. Proc. 39, 2 McCarty Civ. Proc. 106; Carrere v. Spofford, 46 How. Pr. (N. Y.) 294; Secor v. Pendleton, 47 Hun 281, 13 N. Y. St. 387; Bridge v. Swain, 3 Redf. Sur. (N. Y.) 487; Gere v. Clarke, 6 Hill (N. Y.) 350; Richards v. Heather, 1 B. & Ald. 29; Calder v. Rutherford, 3 Brod. & B. 302, 7 E. C. L. 447; Bates Pleadings, Parties and Forms, Vol. I, p. 78.

[5] Robertshaw v. Hanway, 52 Miss. 713.

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as where the suit is upon contract, viz., that the defendant' representatives need not be joined.[6] In any case where th question is raised as to whether property is firm property or be longs to one or more partners individually, then the representa tives of the deceased partner should be joined, as their interest are then directly in controversy.[7]

§ 809. Defendants—Outgoing and incoming partners.— In case one member of a partnership withdraws therefrom, an a former stranger to the partnership replaces the retiring par ner, the question arises as to which one can be joined, or whethe both or neither may be made parties defendant in a suit agains the firm. In case the retiring partner was a member of the firm while the indebtedness was incurred, then, by the rules we hav heretofore discussed, he is liable as one of the parties theret and should be made a party defendant, and the incoming par ner is neither a proper nor necessary party defendant.[8] The sam rule applies, even if the indebtedness was incurred after his with drawal, if the creditor had dealt with the old firm, and believe the withdrawing partner to be a member of the firm when h allowed the indebtedness to be incurred, and further providin that the retiring partner had not given proper notice of his with drawal.[9] Both of the above propositions are subject to chang by contract, and it is undoubtedly true that, all parties interest concurring, the outgoing partner may be relieved from liabilit the incoming partner becoming liable.[10] Mr. Bates says, th

[6] Berkey v. Judd, 22 Minn. 287.

[7] Marble v. Marble, 4 Ky. L. 360; Indiana Pottery Co. v. Bates, 14 Ind. 8.

[8] Hatchett v. Blanton, 72 Ala. 423; Ringo v. Wing, 49 Ark. 457, 5 S. W. 787; Bracken v. Dillon, 64 Ga. 243, 37 Am. Rep. 70; Dyas v. Dinkgrave, 15 La. Ann. 502, 77 Am. Dec. 196; Firemen's Ins. Co. v. Floss, 67 Md. 403, 10 Atl. 139, 1 Am. St. 398; Hughes v. Gross, 166 Mass. 61, 43 N. E. 1031, 32 L. R. A. 620, 55 Am. St. 375; Hayes v. Knox, 41 Mich. 5 2 N. W. 670; Smith v. Douglass, Daly (N. Y.) 191; Ayrault v. Cha berlin, 26 Barb. (N. Y.) 83; Gill Bickel, 10 Tex. Civ. App. 67, 30 W. 919; Maverick v. Maury, 79 Te 435, 15 S. W. 686; Vere v. Ashl 10 B. & C. 288, 21 E. C. L. 28 Young v. Hunter, 4 Taunt. 582; Wi ford v. Wood, 1 Esp. N. P. 182.

[9] See ch. 18 ante, §§ 556, 563.

[10] Tysen v. Somerville, 35 F 219, 17 So. 567; Pfeiffer v. Hunt,

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"of course, the outgoing and incoming partners can not both be held," although he assents to the proposition that a retired partner may not be joined if the opposite party has consented to his release.[11] However, it is impossible to see any distinction between the two propositions, as in both cases the true rule of partnership law is changed by contract. Perhaps the correct manner of stating the rule is this: From a standpoint of partnership liability alone, the outgoing partner is liable for the firm debts incurred while he was an actual member, or before he had terminated his partnership liability by proper notice, and should be made a party, and the incoming partner is not liable for any debts preceding his entrance into the firm, and should not be made a party. By proper contract, however, the true rule of partnership liability may be changed, and either the incoming or outgoing partner, or both, or neither, may be liable, and may be made parties. There is, however, aside from contract thereupon, one situation where both may be liable upon the same contract, upon partnership law alone. In case there is a withdrawal by one partner, without sufficient notice, and an indebtedness is incurred thereafter, and after the incoming partner has joined the firm, both may be liable, the incoming partner as a partner proper, and the outgoing partner by reason of his partnership liability not having ceased. In states where one party can sue upon a contract made in his favor by others,[12] the new partner may be liable, if the new firm has agreed to assume the debts of the old firm, even though the creditor was unaware of the fact at the time it was done. In other states, where the right of a person to sue upon a contract made in his favor is not recognized, the new partner would not be so liable by reason of the fact alone that the new firm had assumed the debts of

Ga. 513; Smith v. Shelden, 35 Mich. 42, 24 Am. Rep. 529; Osborn v. Osborn, 36 Mich. 48; Ellis v. Harrison, 104 Mo. 270, 16 S. W. 198; Meyer v. Lowell, 44 Mo. 328; Manny v. Frasier, 27 Mo. 419; Barlow v. Myers, 64 N. Y. 41, 21 Am. Rep. 582; Arnold v. Nichols, 64 N. Y. 117; Ayrault v. Chamberlin, 26 Barb. (N. Y.) 83.

[11] Bates Pleading, Parties and Forms, p. 238.

[12] Bessemer Sav. Bank v. Rosenbaum Grocery Co., 137 Ala. 530, 34 So. 609; Ringo v. Wing, 49 Ark. 457, 5 S.

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the old, unless the creditor became a party to such agreement, and the new partner should not be made a party.[13]

§ 810. Defendants—Dormant and nominal partners.—Both dormant and nominal partners may be joined as parties defendant, the dormant partners because they are principals, even though not known, and the nominal partners because they have incurred partnership liability. In the latter case it is at the option of the plaintiff as to whether or not he will make a nominal partner a party. He is not a necessary party, inasmuch as he is not a partner. He is a proper party, on account of his having incurred the same liability, to the plaintiff, as if he were a partner.[14] In the former case, the dormant partner by reason of the peculiar nature of his firm connection, and of the usual fact of his not being known to creditors, is not a necessary party unless he becomes known to the plaintiff as a partner, and his non-joinder is not ground for a plea in abatement.[15] In all cases where he is known by the plaintiff as a partner, he should be made a party to the action, and it has been held that if any part-

W. 787; Lehow v. Simonton, 3 Colo. 346; Wright v. Brosseau, 73 Del. 381; Morris v. Marqueze, 74 Ga. 86; Wheat v. Hamilton, 53 Ind. 256; Doxey v. Service, 30 Ind. App. 175, 65 N. E. 757; Poole v. Hintrager, 60 Iowa 180, 14 N. W. 223; Gillen v. Peters, 39 Kans. 489, 18 Pac. 613; Francis v. Smith, 1 Duv. (Ky.) 121; Thompson v. Thompson, 4 Ohio St. 333; Trimble v. Strother, 25 Ohio St. 378. See also Arnold v. Nichols, 64 N. Y. 117; Reynolds v. Lawton, 62 Hun (N. Y.) 596, 17 N. Y. S. 432, 43 N. Y. St. 578; McGibbon v. Walsh, 109 Wis. 670, 85 N. W. 409; Hine v. Beddome, 8 U. C. C. P. 381. But see Canadian Bank v. Marks, 19 Ont. 450; Lee v. Fountain, 10 Ala. 755, 44 Am. Dec. 505.

[13] Wild v. Dean, 3 Allen (Mass.) 579; Ayres v. Gallup, 44 Mich. 13, 5 N. W. 1072; Manny v. Frazier, 2 Mo. 419; Morehead v. Wriston, 7 N. Car. 398; Kountz v. Holthouse 85 Pa. St. 235; McCarteney v. Wyoming Nat. Bank, 1 Wyo. 382; Ex parte Appleby, 2 Deac. 482; Ex part Freeman, Buck. 471.

[14] Hatch v. Wood, 43 N. H. 633.

[15] Desha v. Holland, 12 Ala. 513 46 Am. Dec. 261; Tomlinson v. Spencer, 5 Cal. 291; Goggin v. O'Donnell, 62 Ill. 66; Hopkins v. Kent, 1 Md. 72; Wright v. Herrick, 125 Mass 154; Wood v. Cullen, 13 Minn. 394 Pinschower v. Hanks, 18 Nev. 99, Pac. 454; North v. Blass, 30 N. Y 374; Arnold v. Morris, 7 Daly (N Y.) 498; Nichols v. Cheairs, 4 Snee (Tenn.) 229; Jackson v. Alexander 8 Tex. 109; Cleveland v. Woodward 15 Vt. 302, 40 Am. Dec. 682. See Keesey v. Old, 3 Tex. Civ. App. 1

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ners are omitted, it must appear by averment that their legal obligations have ceased.[16]

§ 811. Nonjoinder of defendants in contract obligations. —In states where partners are jointly liable, they must be so sued in actions on contract. However, nonjoinder of copartners is waived by failure of the opposing party to plead the same.[17] At common law such nonjoinder must be pleaded in abatement;[18] or if apparent on the face of the record, by demurrer, motion in arrest, or on error;[19] or the objection is waived. Under the codes it must also be pleaded in abatement;[20] or if

21 S. W. 693; Swan v. Steele, 7 East 209; Cox v. Hickman, 8 H. L. Cas. 268.

[16] Hyde v. Van Valkenburg, 1 Daly (N. Y.) 416.

[17] Waits v. McClure, 10 Bush (Ky.) 763; Albro v. Lawson, 17 B. Mon. (Ky.) 642; Davis v. Willis, 47 Tex. 154; Evans &c. Brick Co. v. Hadfield, 93 Wis. 665, 68 N. W. 468.

[18] Jordan v. Wilkins, 3 Wash. (U. S.) 110, Fed. Cas. No. 7527; Coffee v. Eastland, Fed. Cas. No. 2945; Clementson v. Beatty, Fed. Cas. No. 2884, 1 Cranch (C. C.) 178; Smith v. Hunt, 2 Stew. (Ala.) 222; Hicks v. Branton, 21 Ark. 186; Hamilton v. Buxton, 6 Ark. 24; Beard v. Knox, 5 Cal. 252, 63 Am. Dec. 125; Douglas v. Chapin, 26 Conn. 76; Shufeldt v. Seymour, 21 Ill. 524; Page v. Brant, 18 Ill. 37; Sinsheimer v. William Skinner Mfg. Co., 54 Ill. App. 151, 165 Ill. 116, 46 N. E. 262; Carico v. Moore, 4 Ind. App. 20, 29 N. E. 928; Nichols v. Burton, 5 Bush (Ky.) 320; Fogg v. Virgin, 19 Maine 352, 36 Am. Dec. 757; Smith v. Cooke, 31 Md. 174, 100 Am. Dec. 58; Purvis v. Butler, 87 Mich. 248, 49 N. W. 564; Campbell v. Wallace, 12 N. H. 362, 37 Am. Dec. 219; Curran v. William Kendall Boot &c. Co., 8 N. Mex. 417, 45 Pac. 1120; Kingsland v. Braisted, 2 Lans. (N. Y.) 17; Robertson v. Smith, 18 Johns. (N. Y.) 459, 9 Am. Dec. 227; Witmer v. Schlatter, 2 Rawle (Pa.) 359; Deal v. Bogue, 20 Pa. St. 228, 57 Am. Dec. 707; Tynberg v. Cohen, 67 Tex. 220, 2 S. W. 734; Cleveland v. Woodward, 15 Vt. 302, 40 Am. Dec. 682; Wilson v. McCormick, 86 Va. 995, 11 S. E. 976; Brown v. Belches, 1 Wash. (Va.) 9; Urton v. Hunter, 2 W. Va. 83; King v. Hoare, 13 M. & W. 494; Rice v. Shute, 5 Burr 2611, 1 Smith Lead. Cas. 287.

[19] Hamilton v. Buxton, 6 Ark. 24; Douglas v. Chapin, 26 Conn. 76; Sandusky v. Sidwell, 173 Ill. 491 (affd. 173 Ill. 493, 50 N. E. 1003); Sinsheimer v. William Skinner Mfg. Co., 156 Ill. 116, 165 Ill. 116, 46 N. E. 262; Cummings v. People, 50 Ill. 132; McGregor v. Balch, 17 Vt. 562; Wilson v. McCormick, 86 Va. 995, 11 S. E. 976; Shields v. Oney, 5 Munf. (Va.) 550.

[20] Simonton v. Rohm, 14 Colo. 51, 23 Pac. 86; Sandwich Mfg. Co. v. Herriott, 37 Minn. 214, 33 N. W. 782; Tinkum v. O'Neale, 5 Nev. 93; Bridge v. Payson, 5 Sandf. (N. Y.) 210; Whiting v. Turley, Dall. (Tex.) 453.

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apparent on the record should be raised by demurrer;[21] or by answer;[22] or is waived. Some states have, by statutory enactment, provided that, under certain conditions, certain partnerships may sue and be sued in the usual or ordinary name which it has assumed, or by which it is known, without alleging each member thereof. This is, however, not exclusive, but simply permissive, and either or both methods may be adopted.[23] The above provisions, however, usually refer merely to those partnerships formed for carrying on business in the county where the action is brought, and do not extend to foreign partnerships, and such firms should be sued in the names of the individual partners.[24] An exception to the general rule just stated is, however, recognized when an attachment suit is brought in the firm name, against a nonresident partnership formed for the purpose of doing business within the state, and with a place of business therein. Service may be had on such firm by leaving a copy of the summons at such place of business.[25]

§ 812. Nonjoinder of defendants in tort.—Unlike partnership liability in contract, the liability growing out of partnership torts is universally held to be both joint and several, and all the partners may be sued jointly, or any one of them may be sued individually.[26] All the partners may be liable for the

[21] Whittaker v. Collins, 34 Minn. 299, 25 N. W. 632, 57 Am. Rep. 55; Hyrne v. Erwin, 23 S. Car. 226, 55 Am. Rep. 15.

[22] Harrison v. McCormick, 69 Cal. 616, 11 Pac. 456; Carico v. Moore, 4 Ind. App. 20, 29 N. E. 928; Alexander v. Collins, 2 Ind. App. 176, 28 N. E. 190; Albro v. Lawson, 17 B. Mon. (Ky.) 642; Waits v. McClure, 10 Bush (Ky.) 763; Sandwich Mfg. Co. v. Herriott, 37 Minn. 214, 33 N. W. 782; Kingsland v. Braisted, 2 Lans. (N. Y.) 17; Zabriskie v. Smith, 13 N. Y. 322, 64 Am. Dec. 551; Kayser v. Sichel, 34 Barb. (N. Y.) 84 (affd. 42 N. Y. 120, 4 Abb. Dec. 592, 33 How. Prac. 174); Belshaw Colie, 1 E. D. Smith (N. Y.) 213.

[23] Markham v. Buckingham, 21 Iow 494, 89 Am. Dec. 590; Whitman Keith, 18 Ohio St. 134.

[24] Critchell v. Cook, 7 Ohio De 314, 2 iVkly. Cin. Law Bul. 97.

[25] Byers v. Schlupe, 51 Ohio S 300, 38 N. E. 117, 25 L. R. A. 649.

[26] Murphy v. Coppieters, 136 C 317, 68 Pac. 970; Pratt v. Brewster, Conn. 65; Stevens v. Faucet, 24 I 483; Helm v. O'Rourke, 46 La. An 178, 15 So. 400; McCrillis v. Hawe 38 Maine 566; Head v. Goodwin, Maine 181; Stockton v. Frey, 4 G (Md.) 406, 45 Am. Dec. 138; Patt

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torts of one, such as misrepresentations made in the course of firm business,[27] and the same rule applies to other torts one may commit in the scope of the partnership business, and for it. Likewise, such liability in tort may be incurred against the firm by a servant, and in such cases, whether the tort be committed by a mere servant, or by a partner, and when the firm liability is complete, any one or all of the members may be liable upon the tort.[28] There is a slightly different rule if the tort is a breach of contract, that is, consisted in the breach of a contract, through malfeasance or misfeasance, and in such case all the partners must be joined as defendants, the rules as to contract liability applying.[29] "The principle running through all the cases seems to be that where the action is maintainable for the tort simply, without reference to any contract between the parties, the action is one of tort purely, although the existence of a contract may have been the occasion or furnished the opportunity for committing the tort. But where the action is not maintainable without pleading and proving the contract,—where the gist of the action is a breach of the contract, either by malfeasance or nonfeasance,—it is in substance, whatever may be the form of the pleading, an action on the contract, and hence all persons jointly liable must be sued."[30]

v. Gurney, 17 Mass. 182, 9 Am. Dec. 141; Randolph v. Daly, 16 N. J. Eq. 313; Roberts v. Johnson, 58 N. Y. 613; Harris v. Schultz, 40 Barb. (N. Y.) 315; Hutton v. Murphy, 9 Misc. (N. Y.) 151, 29 N. Y. S. 70, 59 N. Y. St. 662; Mode v. Penland, 93 N. Car. 292; Barfield v. Coker, 73 S. Car. 181, 53 S. E. 170; Holden v. Lynn, 30 Okla. 663, 120 Pac. 246, 38 L. R. A. (N. S.) 239; Holden v. Lynn, 30 Okla. 663, 120 Pac. 246; White v. Smith, 12 Rich. L. (S. Car.) 595; Fletcher v. Ingram, 46 Wis. 191, 50 N. W. 424; Edmonson v. Davis, 4 Esp. N. P. 14; Hudson v. Robinson, 4 M. & S. 475.

[27] Peckham Iron Co. v. Harper, 41 Ohio St. 100. See ante §§ 503-507.

[28] Stockton v. Frey, 4 Gill (Md) 406, 45 Am. Dec. 138; Roberts v. Johnson, 58 N. Y. 613; White v. Smith, 12 Rich. (S. Car.) 595; Hyrne v. Erwin, 23 S. Car. 226, 55 Am. Rep. 15; Fletcher v. Ingram, 46 Wis. 191, 50 N. W. 424.

[29] Whittaker v. Collins, 34 Minn. 299, 25 N. W. 632, 57 Am. Rep. 55; Harris v. Schultz, 40 Barb. (N. Y.) 315; Orange Bank v. Brown, 3 Wend. (N. Y.) 158; Buddle v. Willson, 6 T. R. 369. See § 811 supra.

[30] Whittaker v. Collins, 34 Minn. 299, 25 N. W. 632, 57 Am. Rep. 55.

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§ 813. Suit against one partner.—A suit can not be commenced against one member of a partnership on a contract liability, as a rule, unless all the members of the firm are made codefendants, unless he has by some act rendered himself severally liable,[31] or purchases goods from a third party, while doing business in his own name and concealing the name or connection of his copartner in order to avoid liability of the copartner, in which case the contracting partner may be sued alone and the goods seized,[32] or otherwise contracts for the firm in his own name and upon his own credit, and the person with whom he deals does not know of the existence of a partnership,[33] or where the statute provides otherwise, as, for example, where one of the partners resides out of the state, and authority is given in such case to sue the resident partner.[34]

§ 814. Equitable actions involving partnerships.—The first requisite in an equitable action between partners and third persons is to show that no adequate remedy exists at law.[35] Judge Story says:[36] "It may be stated as the general doctrine, that the same remedies in equity will lie for the vindication of the rights and the redress of the wrongs, of the partnership, as ordinarily belong to private individuals. Thus, for example, if one partner should collude with a third person to defraud the

[31] Cox v. Gille Hdw. &c. Co., 8 Okla. 483, 58 Pac. 645.

[32] Davis v. Bingham (Tex.), 46 S. W. 840.

[33] Settembre v. Putnam, 30 Cal. 490; Sylvester v. Smith, 9 Mass. 119; Cookingham v. Lasher, 41 N. Y. 454, 1 Abb. Dec. 436; Clark v. Holmes, 3 Johns. (N. Y.) 148; Brownlee v. Lobenstein (Tenn. Ch.), 42 S. W. 467; Hagar v. Stone, 20 Vt. 106; Cleveland v. Woodward, 15 Vt. 302, 40 Am. Dec. 682.

[34] People's Nat. Bank v. Hall, 76 Vt. 280, 56 Atl. 1012.

[35] Rothwell v. Dewees, 2 Black. (U. S.) 613; McCampbell v. Brown, 48 Fed. 795; Pearson v. Keedy, 6 B. Mon. (Ky.) 128; Sneed v. Coyle, 4 Litt. (Ky.) 163; Cutler v. Cochran, 13 La. 482; Flack v. Charron, 29 Md. 311; Bartlett v. Parks, 1 Cush. (Mass.) 82; Parish v. Lewis, Free. (Miss.) 299; Penny v. Martin, 4 Johns. Ch. (N. Y.) 566; Coster v. Clarke, 3 Edw. Ch. (N. Y.) 411; Robb v. Stevens, Clarke Ch. (N. Y.) 191; Leake &c. Orphan House v. Lawrence, 11 Paige (N. Y.) 80; Copcutt v. Merchant, 4 Bradf. Sur. (N. Y.) 18; Donaldson v. State Bank, 16 N. Car. 103, 18 Am. Dec. 577.

[36] Story Partnership, § 259.

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partnership by wrongfully using the partnership name, or negotiating the securities, or applying the property thereof for improper purposes, a court of equity would by an injunction, restrain him from so doing. So if a third person should violate a copyright or patent right belonging to a partnership, an injunction would, in like manner, lie to restrain him from such illegal conduct. So if a separate creditor of one partner should knowingly aid in the misapplication of the partnership funds to his own debts, a court of equity would restrain him from so aiding in such misconduct; and if he had so improperly received the funds thereof, it would compel him to restore the same to the partnership. So a court of equity will restrain a third person by injunction, who is injuring the partnership by vending an article of trade, similar to that manufactured by the partnership, falsely, under the name of the partnership, and as if manufactured by the same, and thus misleading the public and diverting the patronage and custom from the partnership. The same rule will apply to any other false and wrongful use of the partnership name and reputation, by deceptive imitations of the labels, devices, or ornaments used by the partnership upon their own manufactured cutlery, or vehicles, or medicinal preparations, or otherwise in the course of their business. So in like manner an injunction will lie for a partnership to prevent a third person from publishing a magazine, or other periodical in their names, after they have ceased to have any connection with it."

§ 815. **Parties in equitable actions.**—Equity may take jurisdiction in a suit against a partnership one of whose members is a nonresident, when otherwise the remedy would have been by action at law.[87] All the partners should be made parties either plaintiff or defendant, to an action in equity involving partnership moneys or property.[88] An unwilling partner in an

[87] Farrar v. Haselden, 9 Rich. Eq. (S. Car.) 331; Williams v. Donaghe, 1 Rand. (Va.) 300.

[88] West v. Randall, 2 Mason (U. S.) 181, Fed. Cas. No. 17424; McCampbell v. Brown, 48 Fed. 795; Frost v. Schackleford, 57 Ga. 260; Gerard v. Bates, 124 Ill. 150, 16 N. E. 258, 7 Am. St. 350; Lombard v. Johnson, 76 Ill. 599; Postlewait v.

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action by the other partners on a partnership claim should be made a defendant.[39] The fact that the joining of one partner would oust the court from jurisdiction, because such partner is a nonresident, may cause his nonjoinder to be disregarded,[40] if a decree can be rendered without prejudice to the interests of the nonresident partner.[41] In some cases where the partners are very numerous, less than all will be allowed to sue or be sued on behalf of the firm.[42] It seems that the general rule in actions in equity is that the representatives of deceased partners, or their heirs, need not be joined,[43] although in some instances according to certain authorities a contrary rule is held.[44]

§ 816. Venue.—Where a firm may be sued by its firm name, as an entity, it is held to have a residence in any county

Howes, 3 Iowa 365; Hoy v. McMurray, 1 Litt. (Ky.) 364; Fowle v. Torrey, 131 Mass. 289; Russel v. Swan, 16 Mass. 314; DeGreiff v. Wilson, 30 N. J. Eq. 435; Isham v. Phelps, 54 N. Y. 673; Gaither v. Caldwell, 1 Dev. & Bat. Eq. (N. Car.) 504; Noyes v. Sawyer, 3 Vt. 160; Dunbar v. Buck, 6 Munf. (Va.) 34.

[39] Edgell v. Felder, 84 Fed. 69, 28 C. C. A. 382; Fallowes v. Williamson, 11 Ves. Jr. 306; Leigh v. Thomas, 2 Ves. 313.

[40] West v. Randall, 2 Mason (U. S.) 181, Fed. Cas. No. 17424; Carson v. Robertson, Chase (U. S.) 475, Fed. Cas. No. 2466.

[41] Vose v. Philbrook, 3 Story (U. S.) 335, Fed. Cas. No. 17010; Milligan v. Milledge, 3 Cranch (U. S.) 220, 2 L. ed. 417; Palmer v. Stevens, 100 Mass. 461; Darwent v. Walton, 2 Atk. 510.

[42] Story Eq. Plead., § 116; Parsons v. Howard, 2 Woods (U. S.) 1; Goldman v. Page, 59 Miss. 404; Wall v. Boisgerard, 11 Smed. & M. (Miss.) 574; Small v. Atwood, 1 Younge 407; Taylor v. Salmon, 4 Myl. & C. 134; Wallworth v. Holt, 4 Myl. & C. 619; Hichens v. Congreve, 4 Russ. 562; Walburn v. Ingilby, 1 Myl. & K. 61; Mare v. Malachy, 1 Myl. & C. 559; Cockburn v. Thompson, 16 Ves. Jr. 321; Lloyd v. Loaring, 6 Ves. Jr. 773.

[43] Rothwell v. Dewees, 2 Black. (U. S.) 613, 17 L. ed. 309; Bischoffsheim v. Baltzer, 20 Fed. 890; McCandless v. Hadden, 9 B. Mon. (Ky.) 186; Folsom v. Detrich Fertilizer Co., 85 Md. 52, 36 Atl. 446; Harwood v. Jones, 10 Gill & J. (Md.) 404, 32 Am. Dec. 180; Robinson v. Thompson, Smed. & M. Ch. (Miss.) 454; Robertshaw v. Hanway, 52 Miss. 713; Rusling v. Brodhead, 55 N. J. Eq. 200, 35 Atl. 841; Waugh v. Mitchell, 1 Dev. & Bat. Eq. (N. Car.) 510.

[44] Story Eq. Plead., § 167, criticized in Robertshaw v. Hanway, 52 Miss. 713. See also Postlewait v. Howes, 3 Iowa 365; Pearce v. Bruce, 38 Ga. 444; Lockhart v. Harrell, 6 La. Ann. 530; Carter v. Currie, 5 Call (Va.) 158.

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where it does business and may there be sued.[45] In other jurisdictions the venue depends on the residence of the partners.[46] Where there was a diversity of citizenship between members of a firm and the plaintiff, service on one member would confer federal jurisdiction on the firm and the partner served.[47] As an action for the price of goods is transitory, service on a partner in the county where the action is brought may give the court jurisdiction of a copartner who was served in another county.[48] Equity jurisdiction may extend to real property outside the state;[49] or be invoked in actions where one party is a nonresident,[50] and is in other respects broad.[51]

§ 817. **Process and service.**—Ordinarily in an action against partners, unless the statute permits suits against partnership by its firm name, the names of all the members of a partnership should be set out in the summons,[52] and in actions by partners the process should name all the partners individually,[53] except in case of dormant partners.[54] Some cases hold the citation may be in the firm name, if the petition contains the names of all the

[45] Watson v. Coon, 247 Ill. 414, 93 N. E. 289; Sketchley v. Smith, 78 Iowa 542, 43 N. W. 524; Fitzgerald v. Grimmell, 64 Iowa 261, 20 N. W. 179; Marsh v. Marsh, 9 Rob. (La.) 45; Hobson v. Whittemore, 13 La. 422. Contra: Byers v. Schlupe, 51 Ohio St. 300, 38 N. E. 117, 25 L. R. A. 649.

[46] Adams v. May, 27 Fed. 907; Pyron v. Ruohs, 120 Ga. 1060, 48 S. E. 434; Wadley v. Jones, 55 Ga. 329; Kamp v. Bartlett, 164 Ill. App. 338.

[47] Empire Rice Mill Co. v. Neumond, 199 Fed. 800.

[48] George Bohon Co. v. Moren, 151 Ky. 811, 152 S. W. 944.

[49] Jones v. Fletcher, 42 Ark. 422; Griggs v. Clark, 23 Cal. 427; Godfrey v. White, 43 Mich. 171, 5 N. W. 243.

[50] Gaines v. Nashville &c. Bank (Tenn. Ch.), 52 S. W. 467; Harris v. Fleming, 13 Ch. D. 208; Southern v. Harriman, 10 L. T. (N. S.) 263.

[51] Schick v. Corbett, 52 La. Ann. 180, 26 So. 862; Reed v. Johnson, 24 Maine 322; Eden v. Nash, 7 Ch. D. 781.

[52] Tarlton v. Herbert, 4 Ala. 359; Maritime Bank v. Rand, 24 Conn. 9; Gillett v. Walter, 74 Ga. 291; Dunham v. Shindler, 17 Ore. 256, 20 Pac. 326; Jones v. Fegely, 1 Phila. (Pa.) 1; Lash v. Morris County Bank (Tex. Civ. App.), 54 S. W. 806.

[53] Moore v. Burns, 60 Ala. 269; Lanford v. Palton, 44 Ala. 584; Mitchell v. Dall, 2 Har. & G. (Md.) 159; Barber v. Smith, 41 Mich. 138, 1 N. W. 992; Smith v. Canfield, 8 Mich. 493.

[54] Mitchell v. Dall, 2 Har. & G. (Md.) 159.

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partners.[55] Other cases hold that a failure to set out the indi vidual names of the partners does not invalidate the judgment.[5] If a warrant would not lie against the individual members of a firm it is not proper process against the partnership.[57] The general rule is that in the absence of statute, process must be served upon all the members of a partnership in order to bind the firm, and service upon one partner does not give jurisdiction of the partners who were not served or of the partnership as such.[58] In Pennsylvania it has always been held that service on one partner binds the partnership property.[59] And in most states it is provided by statute that service on one member of a partnership shall bind the firm in actions against the members of a partnership as such.[60] Under most of such statutes a judgment rendered on service on less than all the partners binds the firm assets, but not the individual assets of those not served, though

[55] Clayburg v. Ford, 3 Ill. App. 542; Putman v. Wheeler, 65 Tex. 522; Andrews v. Ennis, 16 Tex. 45.

[56] Keathley v. Stump, 147 Ky. 406, 144 S. W. 87; Fredlock v. Fredlock (W. Va.), 74 S. E. 865.

[57] Faulkner v. Whitaker, 15 N. J. L. 438.

[58] In re Grossmayer, 177 U. S. 48, 44 L. ed. 665; Romona Oolitic Stone Co. v. Bolger, 179 Fed. 979; McGrew v. Earnest, 167 Ala. 531, 52 So. 639; Demott v. Swaim, 5 Stew. & P. (Ala.) 293; Ingraham v. Gildermester, 2 Cal. 88; Ellsberry v. Block, 28 Colo. 477, 65 Pac. 629; Sherburne v. Hyde, 185 Ill. 580, 57 N. E. 776; Siegel v. Moses, 159 Ill. App. 624; Heavrin v. Lack Malleable Iron Co., 153 Ky. 329, 155 S. W. 729; Rice v. Doniphan, 4 B. Mon. (Ky.) 123; Scott v. Bogart, 14 La. Ann. 261; Pitman v. Planters' Bank, 1 How. (Miss.) 527; Van Natta v. Harroun Real Estate Co., 221 Mo. 373, 120 S. W. 738; People's Nat. Bank v. Hall, 76 Vt. 280, 56 At 1012; Carlon v. Ruffner, 12 W. Va 297.

[59] Taylor v. Henderson, 17 Serg R. (Pa.) 453; Lipewitz v. Siglin, 1 Pa. Dist. Ct. 655; Walsh v. Kirby 228 Pa. 194, 77 Atl. 452.

[60] Empire Rice Mill Co. v. Net mond, 199 Fed. 800; Lippincott v Shaw Carriage Co., 25 Fed. 577 (con struing Indiana statute); Ellsberry v Block, 28 Colo. 477, 65 Pac. 629 Hayman v. Weil, 53 Fla. 127, 44 So 176; Printup v. Turner, 65 Ga. 71 Fleshman v. Collier, 47 Ga. 253; Der ton v. Hannah, 12 Ga. App. 494; Gu v. Kaulman, 75 S. E. 269, 11 Ga App. 350; Nixon v. Downey, 4 Iowa 78; Walker v. Clark, 8 Iow 474; Parker v. Danforth, 16 Mas 299; Hirsh v. Fisher, 138 Mich. 9 101 N. W. 48, 11 Detroit Leg. N 483; Brooks v. McIntyre, 4 Mich 316; Whitmore v. Shiverick, 3 Nev 288; Lewinson v. Albuquerque Fir Nat. Bank, 11 N. Mex. 510, 70 Pa

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usually the partner served is bound personally.[61] "Judgments in cases of this kind against the parties not served with process or who do not appear therein, have no binding force upon them personally. The principle is as old as the law, and is of universal justice, that no one shall be personally bound until he has had his day in court, which means until citation is issued to him, and opportunity to be heard is afforded."[62] If the action is not brought until after dissolution of the firm, the same rules as to service apply, and service on one partner will bind the firm assets

567; Yerkes v. McFadden, 141 N. Y. 136, 36 N. E. 7; Crane v. French, 1 Wend. (N. Y.) 311; Staiger v. Theiss, 19 Misc. 170, 43 N. Y. S. 292; Vandervoort v. Palmer, 4 Duer (N. Y.) 677; Oakley v. Aspinwall, 4 N. Y. 513; Goldstein v. Peter Fox Sons Co., 22 N. Dak. 636, 135 N. W. 180, 40 L. R. A. (N. S.) 566n; Sayre Commission Co. v. Keen, 26 Okla. 794, 110 Pac. 775; Symms Grocer Co. v. Burnham, 6 Okla. 618, 52 Pac. 918; Pierce v. Varn, 76 S. Car. 359, 57 S. E. 184; Whitfield v. Hovey, 30 S. Car. 117, 8 S. E. 840; Guimond v. Nast, 44 Tex. 114; Alexander v. Stern, 41 Tex. 193; Slaughter v. American Baptist Publication Society (Tex. Civ. App.), 150 S. W. 224; Blumenthal v. Youngblood, 24 Tex. Civ. App. 266, 59 S. W. 290; Livingston v. Lovgren, 27 Wash. 102, 67 Pac. 599; McCoy v. Bell, 1 Wash. 504, 20 Pac. 595; Young v. Krueger, 92 Wis. 361, 66 N. W. 355; Fowler v. Bailley, 14 Wis. 125.

[61] Ratchford v. Covington County Stock Co. (Ala.), 55 So. 806; Denton v. Hannah (Ga. App.), 77 S. E. 672; Warren Brick Co. v. Lagarde Lime &c. Co., 12 Ga. App. 58, 76 S. E. 761; Guy v. Kaulman, 11 Ga. App. 350, 75 S. E. 269; Rickman v. Rickman, 180 Mich. 224, 146 N. W. 609; Heaton v. Schaefer, 34 Okla. 631, 126 Pac. 797, 43 L. R. A. (N. S.) 540n. See cases cited in preceding note.

[62] Mason v. Eldred, 6 Wall. (U. S.) 231, 18 L. ed. 783. See also Sugg v. Thorton, 132 U. S. 524, 33 L. ed. 447, 10 Sup. Ct. 163; Ladiga Saw-Mill Co. v. Smith, 78 Ala. 108; Booth v. Gamble-Robinson, 139 Cal. 175, 72 Pac. 908; Barnes v. Colorado Springs &c. R. Co., 42 Colo. 461, 94 Pac. 570; Orlando First Nat. Bank v. Greig, 43 Fla. 412, 31 So. 239; Fleshman v. Collier, 47 Ga. 253; Harford v. Street, 46 Iowa 594; Gaiennie v. Akin, 17 La. 42, 36 Am. Dec. 604; McGehee v. McCord, 14 La. 362; Bonesteel v. Todd, 9 Mich. 371, 80 Am. Dec. 90; Rowland v. Shephard, 27 Nebr. 494, 43 N. W. 344; Winters v. Means, 25 Nebr. 241, 41 N. W. 157, 13 Am. St. 489; Crane v. French, 1 Wend. (N. Y.) 311; Oakley v. Aspinwall, 4 N. Y. 513; Symms Grocer Co. v. Burham, 6 Okla. 618, 52 Pac. 918; Whitfield v. Hovey, 30 S. Car. 117, 8 S. E. 840; Adickes v. Allison, 21 S. Car. 245; Patten v. Cunningham, 63 Tex. 666; Hedges v. Armistead, 60 Tex. 276; Blumenthal v. Youngblood, 24 Tex. Civ. App. 266, 59 S. W. 290; Coughlin v. Pinkerton, 41 Wash. 500, 84 Pac. 14; Fowler v. Bailley, 14 Wis. 125.

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and bind him personally.[63] Some statutes permit service of process on a partnership by leaving a copy at its usual place of business with a member or some specified agent,[64] and others allow service by publication on nonresident partners.[65] Publication notice to a partnership in its firm name, gives no jurisdiction, in a state where a partnership may not be sued in its firm name.[66] But there are a few cases which have held a judgment on such service valid as against collateral attack,[67] or have permitted amendment of the process before judgment.[68] But such notice, if the individual names of the partners are given properly therein is good even though there was a mistake in giving the firm name of the firm as members of which they were described.[69] Where service on one partner is sufficient an acceptance or waiver of service by one partner is enough.[70] An acknowledgment of

[63] Thomas v. Nathan, 65 Fla. 386, 62 So. 206; Nathan v. Thomas, 63 Fla. 235, 58 So. 247, Ann. Cas. 1914 A, 387n; Harford v. Street, 46 Iowa 594; Hale v. Van Saun, 18 Iowa 19; Van Eps v. Dillaye, 6 Barb. (N. Y.) 244; Sanger v. Overmeier, 64 Tex. 57; Alexander v. Stern, 41 Tex. 193.

[64] In re Grossmayer, 177 U. S. 48, 44 L. ed. 665, 20 Sup. Ct. 535; Ralya Market Co. v. Armour, 102 Fed. 530; Mitchell &c. Furniture Co. v. Sampson, 40 Fed. 805; Heyman v. Decatur Street Bank (Ga. App.), 84 S. E. 483; Kamp v. Bartlett, 164 Ill. App. 338; Leslie v. Bartlett, 164 Ill. App. 346; Watson v. Coon, 155 Ill. App. 158; Hanna v. Emerson, 45 Nebr. 708, 74 N. W. 229; Herron v. Cole, 25 Nebr. 692, 41 N. W. 765; Grady v. Fosline, 48 Ohio St. 665, 29 N. E. 768; First Nat. Bank of Bandon v. Manassa (Ore.), 150 Pac. 258; Coughlin v. Pinkerton, 41 Wash. 500, 84 Pac. 14; Pollexfen v. Sibson, 16 Q. B. D. 792, 55 L. J. Q. B. 294, 54 L. T. Rep. (N. S.) 297, 34 Wkly. Rep. 534; Ex parte Young, 19 Ch. D. 124, 51 L. J. Ch. 141, 45 L. T. Rep. (N. S.) 493, 30 Wkly. Rep. 330.

[65] Watson v. Coon, 155 Ill. App. 158, 93 N. E. 289; Nye v. Rutherford, 8 Ohio Dec. (Reprint) 224, 6 Cin. Wkly. Law Bul. 378; Martin v. Burns, 80 Tex. 676, 16 S. W. 1072; Likens v. McCormick, 39 Wis. 313.

[66] Moses P. Johnson Machinery Co. v. Watson, 57 Mo. App. 629; Smith v. Hoover, 39 Ohio St. 249; Perry-Rice Grocery Co. v. W. E. Craddock Grocery Co., 34 Tex. Civ. App. 442, 78 S. W. 966.

[67] Neiswanger v. Ord, 81 Kans. 63, 105 Pac. 17, 29 L. R. A. (N. S.) 287n. See also Fox v. Blue Grass Grocery Co., 61 S. W. 265, 22 Ky. L. 169; Deleon v. Heller, 77 Ga. 740; George Norris Co. v. Levin, 81 S. Car. 36, 61 S. E. 1103.

[68] Frisk v. Reigelman, 75 Wis. 499, 43 N. W. 1117, 44 N. W. 766, 17 Am. St. 198.

[69] Tabler v. Mitchell, 62 Miss. 437.

[70] McCaskey v. Pollock, 82 Ala.

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service made by one partner, or affidavit may sometimes be sufficient.[71] In New York service on an agent of a partnership is insufficient to bind the partners.[72] It has been held that if one partner is duly served in an action against a partnership he is in court both as a partner and an individual and as surviving partner if he is such.[73] Proper service may be presumed from an answer in the firm name.[74] A judgment rendered against all the members of a partnership where less than all have been served with process, though valid in the state where rendered is not binding in the courts of another state against a nonresident partner not served.[75] "That countries foreign to our own disregard a judgment merely against the person, where he has not been served with process nor had a day in court, is the familiar rule; national comity is never thus extended. The proceeding is deemed an illegitimate assumption of power and resisted as mere abuse. Nor has any faith and credit, or force and effect, been given to such judgment by any state of this union so far as we know; the state courts have uniformly, and in many instances, held them to be void, and resisted their execution by a second judgment thereon."[76] Usually, if a partnership in an action against partners is erroneously described in the process as a corporation, the court will permit amendment to be made to correct the error, since the error is not in suing the wrong party, but in a misdescription of the party sued, and the names of the individual partners may be added,[77] but in some ju-

174, 2 So. 674; Demott v. Swaim, 5 Stew. & P. (Ala.) 293; Southard v. Steele, 3 T. B. Mon. (Ky.) 445; Sanger v. Overmier, 64 Tex. 57.

[71] Bowin v. Sutherlin, 44 Ala. 278; Freeman v. Carhart, 17 Ga. 348; Gale v. Townsend, 45 Minn. 357, 47 N. W. 1064.

[72] Sherman v. Oelsner, 135 N. Y. S. 592.

[73] Bingham Coal &c. Co. v. Blom, 43 Utah 584, 137 Pac. 630.

[74] Houssels v. Coe (Tex. Civ. App.), 159 S. W. 864.

[75] Hall v. Lauming, 91 U. S. 160, 23 L. ed. 271; D'Arcy v. Ketchum, 11 How. (U. S.) 165, 13 L. ed. 648; United States v. American Bell Telephone Co., 29 Fed. 17; Conley v. Chapman, 74 Ga. 709; Phelps v. Brever, 9 Cush. (Mass.) 390, 57 Am. Dec. 56; Wright v. Boynton, 37 N. H. 9, 72 Am. Dec. 319; Wilson v. Niles, 2 Hall (N. Y.) 358.

[76] D'Arcy v. Ketchum, 11 How. (U. S.) 165, 13 L. ed. 648.

[77] Farmers & Merchants' Bank v. Bank of Glen Elder, 46 Kans. 376; Anglo-American Packing &c. Co. v. Turner Casing Co., 34 Kans. 340, 8

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risdictions this is not permitted, on the theory that the wrong party is sued,[78] or that the writ runs against nobody, there being no such party as the one described.[79] If a suit is first brought as against a corporation and later amended to charge individuals as partners, it has been held they may take advantage of the statute of limitations as not being brought into court by the original process.[80]

§ 818. Appearance.—An appearance by one partner will bind the firm property, if service on one member is sufficient.[81] But one partner has no implied authority to enter an appearance which will bind another partner personally,[82] especially another partner who was not served,[83] unless authority is shown or may be presumed from the facts.[84] A forthcoming bond

Pac. 403; Standard Hay & Grain Co. v. Ratliff, 144 Ky. 161, 137 S. W. 1035; Teets v. Snider Heading Mfg. Co., 120 Ky. 653, 87 S. W. 803, 27 Ky. L. 1061; Munzinger v. Courier Co., 82 Hun 575, 31 N. Y. S. 737; Evoy v. Expressmen's Aid Soc., 66 Hun 636, 21 N. Y. S. 641, 51 N. Y. St. 38; Skoog v. New York Novelty Co., 4 N. Y. Civ. Proc. R. 144; Goldstein v. Peter Fox Sons Co., 22 N. Dak. 636, 135 N. W. 180, 40 L. R. A. (N. S.) 566n; Blue Grass Canning Co. v. Wardman, 103 Tenn. 179, 52 S. W. 137.

[78] White Co. v. Fayette Auto Co., 43 Pa. Super. Ct. 532.

[79] Schiele v. Dillard, 94 Ark. 277, 126 S. W. 835; Bartram v. Collins Mfg. Co., 69 Ga. 751; Maisch v. Order of Americus, 223 Pa. 199, 72 Atl. 528; Sawyer v. New York State Clothing Co., 58 Vt. 588, 2 Atl. 483; Halbert v. Soule, 57 Vt. 358.

[80] Leatherman v. Times Co., 88 Ky. 291, 11 S. W. 12, 10 Ky. L. 896, 3 L. R. A. 324, 21 Am. St. 342.

[81] Bowin v. Sutherlin, 44 Ala. 278; Wheatley v. Tutt, 4 Kans. 240; Southard v. Steele, 3 T. B. Mon. (Ky.) 435; Phelps v. Brewer, 9 Cush. (Mass.) 390, 57 Am. Dec. 56; Sanger v. Overmier, 64 Tex. 57.

[82] Hall v. Lanning, 91 U. S. 160, 23 L. ed. 271; Atchison Sav. Bank v. Templar, 26 Fed. 580; Heavrin v Lack Malleable Iron Co., 153 Ky. 329, 155 S. W. 729; Phelps v. Brewer, 9 Cush. (Mass.) 390, 57 Am. Dec. 56; Bean v. Mather, 1 Daly (N. Y.) 440. Compare Binney v. Le Gal, 1 Abb. Pr. 238, 19 Barb. (N. Y.) 592; Percival v. Fuller, 5 Wkly. Notes Cas. (Pa.) 273; Haslet v. Street, 2 McCord (S. Car.) 310, 13 Am. Dec. 274; Bright v. Sampson, 20 Tex. 21; Munster v. Cox, 10 App. Cas. 680, 55 L. J. Q. B. 108, 53 L. T. (N. S.) 474, 34 Wkly. Rep. 461; Mason v. Cooper, 15 Ont. Pr. 418.

[83] Heavrin v. Lack Malleable Iron Co., 153 Ky. 329, 155 S. W. 729.

[84] Dennison v. Hyde, 6 Conn. 508; Freeman v. Carhart, 17 Ga. 348; Hollingsworth v. Atkins, 46 La. Ann. 515, 15 So. 77; Marks v. Fordyce, 5 Ohio Dec. 81; Tomlinson v. Broadsmith [1846], 1 Q. B. 386.

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given by a resident partner to secure firm goods attached is, it is held, not an appearance of a nonresident partner.[85] Nor where suit may be had against a partnership in the firm name, will the acts of partners in employing counsel, giving testimony, and attending trial, be held a personal appearance, so as to bind them personally.[86] Where a partner voluntarily appears at any time in a suit against a firm, as he may,[87] it is a waiver of objections to the service or form of process,[88] but not a waiver of jurisdiction as to the subject-matter.[89]

§ 819. **Dismissal and discontinuance.**—Where action is brought against partners there may usually be a discontinuance or dismissal at any time as to those not served, without affecting the right to proceed to judgment against the others.[90] If some of the persons sought to be charged as partners are not such, the action may be discontinued as to them at any time.[91] If an action is brought as to a firm and its members it may be dismissed as to the members, without affecting rights to proceed against the firm.[92] A dismissal as to a defendant partner who died pending action does not abate a suit.[93] A dismissal as to one

[85] First Nat. Bank v. Sanders Bros. 162 Ky. 374, 172 S. W. 689.

[86] Lansing v. Bever Land Co., 158 Iowa 693, 138 N. W. 833.

[87] Oatio v. Brown, 59 Ga. 711; State v. Cloudt (Tex. Civ. App.), 84 S. W. 415.

[88] Bowin v. Sutherlin, 44 Ala. 278; Anglo-American Packing &c. Co. v. Turner Casing Co., 34 Kans. 340, 8 Pac. 403; Grieff v. Kirk, 15 La. Ann. 320; Blue Grass Canning Co. v. Wardman, 103 Tenn. 179, 52 S. W. 137.

[89] Lackett v. Rumbaugh, 45 Fed. 23.

[90] Mason v. Connors, 129 Fed. 831; Taft v. Church, 164 Mass. 504, 41 N. E. 671; Root v. Herman, 2 City Ct. R. (N. Y.) 409; Link v. Allen, 1 Heisk. (Tenn.) 318; Kingsland &c. Mfg. Co. v. Mitchell (Tex.), 36 S. W. 757; Brown v. Belches, 1 Wash. (Va.) 9; Carlon v. Ruffner, 12 W. Va. 297. Contra: Storm v. Roberts, 54 Iowa 677, 7 N. W. 124; Nall v. Adams, 7 Ala. 475; Lyons v. Jackson, 1 How. (Miss.) 474; Moore v. Otis, 18 Mo. 1118; Hawkins v. Tinnen, 10 Tex. 188; Scalfi v. State, 96 Tex. 559, 31 Tex. Civ. App. 671, 73 S. W. 441.

[91] Wheeler v. Bullard, 6 Port. (Ala.) 352; Johnson v. Green, 4 Port. (Ala.) 127; Stoddart v. Van Dyke, 12 Cal. 437.

[92] Frank v. Tatum, 87 Tex. 204, 25 S. W. 409; Burnett v. Sullivan, 58 Tex. 535.

[93] Dineen v. Lanning, 92 Nebr. 545, 138 N. W. 759.

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partner who was a defendant in a suit by a partnership may terminate the suit of a partnership as such.[94] Even though one partner has a right to discontinue an action by a partnership he will not be permitted to do so, if in collusion with a third party, so as to injure a copartner.[95] If a statute makes liability joint and several a dismissal of tort action by one partner and release of his interest will not prevent another partner recovering damages to his interest.[96]

§ 820. Attachment and garnishment.—The rights to attachment or garnishment in actions either by or against a partnership are governed almost wholly by statute in the various jurisdictions. It has been said that attachment will not lie against a partnership or a partner, for a partnership debt, except by statute.[97] Transfer of firm property in fraud of creditors will support an attachment.[98] In no case will attachment lie against a partnership unless grounds for it lie against every member. The most common grounds of attachment are either the nonresidence or absconding of a debtor or transfer of property in fraud of creditors. It is not ground for attachment that one partner, or less than all, are nonresidents or have absconded, when at least one partner is a resident.[99] If all the partners are

[94] Storrie v. Ft. Worth Stockyards Co. (Tex. Civ. App.), 143 S. W. 286.

[95] Arnold v. Greene, 15 R. I. 348, 5 Atl. 503. Citing Noonan v. Orton, 31 Wis. 265; Winslow v. Newlan, 45 Ill. 145; Loring v. Brackett, 3 Pick. (Mass.) 403; Holkirk v. Holkirk, 4 Madd. 50.

[96] Hoover v. Missouri P. R. Co. (Mo.), 16 S. W. 480; McPike v. McPherson, 41 Mo. 522.

[97] Williams v. Muthersbaugh, 29 Kans. 730; Leach v. Cook, 10 Vt. 239.

[98] Keith v. Fink, 47 Ill. 272; Collier v. Hanna, 71 Md. 253, 17 Atl. 1017; Hirsch v. Hutchison, 64 How. Pr. (N. Y.) 366, 3 Civ. Proc. 106; Citizens' Bank v. Williams, 59 Hun 617, 12 N. Y. S. 678, 35 N. Y. St. 542; Heye v. Bolles, 2 Daly (N. Y.) 231; Friend v. Michaelis, 15 Abb. N. Cas. (N. Y.) 354; Sellew v. Chrisfield, 1 Handy (Ohio) 86; Evans v. Virgin, 69 Wis. 153, 33 N. W. 569; Keith v. Armstrong, 65 Wis. 225, 26 N. W. 445.

[99] Conklin v. Harris, 5 Ala. 213; Inderrieden v. Frost, 155 Ill. App. 575; Smith v. Spinnenweber, 114 Ark. 384, 170 S. W. 84; Wiley v. Sledge, 8 Ga. 532; Boorum v. Ray, 72 Ind. 151; Williams v. Muthersbaugh, 29 Kans. 730; Wilcox v. Carey, 9 Dana (Ky.) 297; Thomas v. Lusk, 13 La. Ann. 277; Shirley v. The Bride, 5 La. Ann.

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nonresidents or have absconded or some ground of attachment exists against each, then attachment of firm property will lie,[1] or if the sole surviving partner is a nonresident or an absconder.[2] Under some statutes the individual property of a nonresident may not be attached for a firm debt.[3] In the states where joint debts are considered joint and several a creditor may sue one partner on a firm debt, and may attach his separate property as an incident to such right.[4] Any disposition of firm property for which the firm is liable, amounting to a fraud upon firm creditors is a ground for attachment of firm property, even though the act of disposition was originally that of one partner.[5] If the firm assets are insufficient to pay its debts, a nonresident partner has been held to have no interest in such assets which will

250; Munroe v. Frosh, 2 La. Ann. 962, 963; Johnston v. Mathews, 32 Md. 363; Edwards v. Hughes, 20 Mich. 289; Scruggs v. Blair, 44 Miss. 406; Curtis v. Hollingshead, 14 N. J. L. 402; Faulkner v. Whitaker, 15 N. J. L. 438; Hollingshead v. Curtis, 14 N. J. L. 402; In re Smith, 16 Johns. (N. Y.) 102; In re Chipman, 14 Johns. (N. Y.) 217; Bogart v. Dart, 25 Hun (N. Y.) 395; Decker v. Bryant, 7 Barb. (N. Y.) 182; Sears v. Gearn, 7 How. Pr. (N. Y.) 383; Cowdin v. Hurford, 4 Ohio 132; Taylor v. McDonald, 4 Ohio 149; White's Case, 10 Watts (Pa.) 217; Remington v. Howard Express Co., 8 R. I. 406; Robinson v. Crowder, 1 Bailey (S. Car.) 185; Wallace v. Galloway, 5 Coldw. (Tenn.) 510; Leach v. Cook, 10 Vt. 239. Compare Faulkner v. Brigel, 101 Ind. 329; Staats v. Bristow, 73 N. Y. 264; Goodman v. Henry, 42 W. Va. 526, 26 S. E. 528, 35 L. R. A. 847; Fretz v. Johnson, 15 Wkly. Notes Cas. (Pa.) 208; Andrews v. Mundy, 36 W. Va. 22, 14 S. E. 414.

[1] Starr v. Mayer, 60 Ga. 546; Williams v. Muthersbaugh, 29 Kans. 730; Curtis v. Hollingshead, 14 N. J. L. 402; Leach v. Cook, 10 Vt. 239.

[2] Wiley v. Sledge, 8 Ga. 532; Roach v. Brannon, 57 Miss. 490.

[3] Johnson v. Jones, 39 Okla. 323, 135 Pac. 12.

[4] Pearce v. Shorter, 50 Ala. 318; Conklin v. Harris, 5 Ala. 213; Connon v. Dunlap, 64 Ga. 680; Williams v. Muthersbaugh, 29 Kans. 730; Stevens v. Perry, 113 Mass. 380; Miller v. Bay Circuit Judge, 41 Mich. 326; Moore v. Otis, 20 Mo. 153; Staats v. Bristow, 73 N. Y. 268; Vankirk v. Wilds, 11 Barb. (N. Y.) 520; White v. Schnebly, 10 Watts (Pa.) 217.

[5] Bryant v. Simoneau, 51 Ill. 324; Reynolds v. Radke, 112 Ill. App. 575; Wilcox v. Carey, 9 Dana (Ky.) 297; Globe Woolen Co. v. Carhart, 67 How. Pr. (N. Y.) 403; Edick v. Green, 38 Hun (N. Y.) 202; Johnson v. Rankin (Tenn. Ch.), 59 S. W. 638; Winner v. Kuehn, 97 Wis. 394, 72 N. W. 227

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sustain an attachment against him.[6] Some states have refused to allow an attachment of firm property because of one partner's fraud.[7] Generally, the individual property of an innocent partner can not be attached for a partnership debt fraudulently contracted by his copartner.[8] In many cases it has been held that attachment may be had in a suit against the firm, of the separate property of each partner,[9] and that in an action against a partner individually, his interest in firm property may be attached,[10] though not his interest in a debt due the firm, as long as firm liabilities are unpaid.[11] Nor can the interest of a partner in a debt due the firm be garnisheed without showing from a final settlement of firm accounts that the firm was solvent, and the amount of the defendant partner's interest, and that there is no possible legal method of compelling a settlement of ac-

[6] First Nat. Bank v. Sanders 162 Ky. 374, 172 S. W. 689.

[7] Edwards v. Hughes, 20 Mich. 289; Wilson Obear Grocery Co. v. Cole, 26 Mo. App. 5; Bogart v. Dart, 25 Hun (N. Y.) 395.

[8] Williams v. Muthersbaugh, 29 Kans. 730; Jaffray v. Jennings, 101 Mich. 515, 60 N. W. 52, 25 L. R. A. 645.

[9] Dollins v. Pollock, 89 Ala. 351, 7 So. 904; Orlando First Nat. Bank v. Greig, 43 Fla. 412, 31 So. 239; Lewis v. Conrad, 11 Iowa 153; Cunningham v. Gushee, 73 Maine 417; Allen v. Wells, 22 Pick. (Mass.) 450, 33 Am. Dec. 757. See also Davis v. Werden, 13 Gray (Mass.) 305; Jaffray v. Jennings, 101 Mich. 515, 60 N. W. 52, 25 L. R. A. 645; Daly v. Bradbury, 46 Minn. 396, 49 N. W. 190; Benedict v. Benedict, 15 N. J. Eq. 150; Kleinsmith v. Kempner, 37 Tex. Civ. App. 246, 83 S. W. 409; Evans v. Virgin, 69 Wis. 153, 33 N. W. 569; Miller v. Mynn, 1 El. & El. 1075, 102 E. C. L. 1075.

[10] Stevens v. Stevens, 39 Conn. 474; Burgess v. Atkins, 5 Blackf. (Ind.) 337; Marston v. Dewberry, 21 La. Ann. 518; Thompson v. Lewis, 34 Maine 167; Phillips v. Bridge, 11 Mass. 242; Day v. McQuillan, 13 Minn. 205; Fleisher v. Hinde (Mo. App.), 93 S. W. 1126; Dow v. Sayward, 14 N. H. 9; Atkins v. Saxton, 77 N. Y. 195; Stewart v. Hunter, 1 Handy 22, 12 Ohio Dec. 6; Trafford v. Hubbard, 15 R. I. 326, 4 Atl. 762, 8 Atl. 690; Schatzill v. Bolton, 2 McCord (S. Car.) 478, 13 Am. Dec. 748; Saunders v. Bartlett, 12 Heisk. (Tenn.) 316; Snell v. Crow, 3 Utah 26, 5 Pac. 522; Brande v. Bond, 63 Wis. 140, 23 N. W. 101.

[11] Winston v. Ewing, 1 Ala. 129, 34 Am. Dec. 768; People's Bank v. Shryock, 48 Md. 427, 30 Am. Rep. 476 (overruling Wallace v. Patterson, 2 Har. & McH. (Md.) 463); Bulfinch v. Winchenbach, 3 Allen (Mass.) 161; Fisk v. Herrick, 6 Mass. 271; Stone v. Dowling, 119 Mich. 476, 78 N. W. 549; Day v. McQuillan, 13 Minn. 205; Allis v. Day, 13 Minn. 199; Barry v. Fisher,

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counts.[12] A few cases have allowed such a garnishment.[13] Some decisions have allowed the garnishment of a debt due the firm by a creditor of the surviving partner, subject to the equities of firm creditors.[14] The interest of one partner which may be reached by an attachment of his individual creditors is his share of the assets remaining after the firm debts have been paid and the accounts of the partners settled among themselves,[15] the general rule is that the attaching officer may take possession of the whole property and upon sale deliver to a purchaser who takes, how-

8 Abb. Pr. (N. S.) (N. Y.) 369, 39 How. Pr. 521; Jarvis v. Hyer, 15 N. Car. 367; Horne v. Petty, 192 Pa. St. 32, 43 Atl. 404; McCoombe v. Dunch, 2 Dall. (Pa.) 73, 1 L. ed. 294; Brenton v. Thompson, 20 Leg. Int. (Pa.) 133; Raley v. Smith (Tex. Civ. App.), 73 S. W. 54; Lacy v. Greenlee (W. Va.), 84 S. E. 921; Menard v. Brouillet, 16 Quebec Super. Ct. 148. See also Church v. Knox, 2 Conn. 514.

[12] Winston v. Ewing, 1 Ala. 129, 34 Am. Dec. 768; Church v. Knox, 2 Conn. 514. See also Atkins v. Prescott, 10 N. H. 120; Crescent Ins. Co. v. Bear, 23 Fla. 50, 1 So. 318, 11 Am. St. 331; Ripley v. People's Sav. Bank, 18 Ill. App. 430; Trickett v. Moore, 34 Kans. 755, 10 Pac. 147; Ursuline Nuns v. Connelly, 22 La. Ann. 51; White Mountain Bank v. West, 46 Maine 15; Smith v. Barker, 10 Maine 458; People's Bank v. Shryock, 48 Md. 427, 30 Am. Rep. 476; Stillings v. Young, 161 Mass. 287, 37 N. E. 175; Fisk v. Herrick, 6 Mass. 271; Mobley v. Lonbat, 7 How. (Miss.) 318; Sheedy v. Second Nat. Bank, 62 Mo. 17, 21 Am. Rep. 407; Stoutenburgh v. Vandenburgh, 7 How. Pr. (N. Y.) 229; Barry v. Fisher, 8 Abb. Pr. (N. S.) (N. Y.) 369, 39 How. Pr. 521; Myers v. Smith, 29 Ohio St. 120; Sweet v. Read, 12 R. I. 121; Johnson v. King, 6 Humph. (Tenn.) 233; Seaton v. Brooking, 1 Tex. Civ. App. 1041; Brande v. Bond, 63 Wis. 140, 23 N. W. 101; Singer v. Townsend, 53 Wis. 126, 10 N. W. 365.

[13] Wallace v. Hull, 28 Ga. 68; Marlin v. Kirksey, 23 Ga. 164; Harlan v. Moriarty, 2 G. Greene (Iowa) 486; Wallace v. Patterson, 2 Harr. & M., H. (Md.) 463; Hill v. Beach, 12 N. J. Eq. 31; McCoombe v. Dunch, 2 Dal. (Pa.) 73, 1 L. ed. 294. See note 59 L. R. A. 378.

[14] Thompson v. Lewis, 34 Maine 167; Berry v. Harris, 22 Md. 30, 85 Am. Dec. 639; Brenner v. Hirsche, 69 Miss. 309, 13 So. 730; Knox v. Schepler, 2 Hill (S. Car.) 595. Compare Rich v. Solari, 6 Mackey (17 D. C.) 371.

[15] Lyndon v. Gorham, 1 Gall. (U. S.) 367; Filley v. Phelps, 18 Conn. 294; Witter v. Richards, 10 Conn. 37; Thomas v. Winchester Bank, 17 Ky. L. 194, 28 S. W. 774, 31 S. W. 732; New Orleans v. Gauthreaux, 32 La. Ann. 1126; Henderson v. Cashman, 85 Maine 437, 27 Atl. 344; People's Bank v. Shryock, 48 Md. 427, 30 Am. Rep. 476; Phillips v. Bridge, 11 Mass. 242; Pierce v. Jackson, 6 Mass. 242; Armistead v. Cocke, 62 Miss. 198; Hill v. Bell, 111 Mo. 35, 19 S. W. 959; Wright v. Radcliffe, 61

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ever, only the one partner's interest.[16] There are some decisior refusing the right to such sale, and the right upon attachmer by creditors of one partner to deprive other partners of po session.[17] An attachment of firm assets by a firm creditor, tak precedence over a prior attachment by a creditor of an individu partner.[18] An attachment by a creditor of an individual partn can not affect the lien acquired by an attaching firm creditor. A partner who has a claim against another partner on partnersh matters has a lien prior to that of individual creditors of anoth

Mo. App. 257; Newman v. Bean, 21 N. H. 93; Morrison v. Blodgett, 8 N. H. 238, 29 Am. Dec. 653; Clements v. Jessup, 36 N. J. Eq. 569; Atkins v. Saxton, 77 N. Y. 195; Souls v. Cornell, 15 App. Div. 151, 44 N. Y. S. 194; Abels v. Westervelt, 24 How. Pr. (N. Y.) 284, 15 Abb. Pr. 230; Cogswell v. Wilson, 17 Ore. 31, 21 Pac. 388; Lucas v. Laws, 27 Pa. St. 211; Lewis v. Paine, 1 Leg. Gaz. (Pa.) 508; Randall v. Johnson, 13 R. I. 338; Warren v. Wallis, 38 Tex. 225; Snell v. Crowe, 3 Utah 26, 5 Pac. 522; Miner v. Pierce, 38 Vt. 610; Baer v. Wilkinson, 35 W. Va. 422, 14 S. E. 1.

[16] Newhall v. Buckingham, 14 Ill. 405; Hershfield v. Claflin, 25 Kans. 166, 37 Am. Rep. 237. Compare Russell v. Smith, 14 Kans. 366; Lee v. Bullard, 3 La. Ann. 462; Walker v. Fitts, 24 Pick. (Mass.) 191; Atkins v. Saxton, 77 N. Y. 195; Hergman v. Dettleback, 11 How. Pr. (N. Y.) 46; Morgan v. Watmough, 5 Watts (Pa.) 125; Morrow v. Fossick, 3 Lea (Tenn.) 129; Saunders v. Bartlett, 12 Heisk. (Tenn.) 316; Snell v. Crowe, 3 Utah 26, 5 Pac. 522; Reed v. Shepardson, 2 Vt. 120, 19 Am. Dec. 697; Shaver v. White, 6 Munf. (Va.) 110, 8 Am. Dec. 730; Northwest Bank v. Taylor, 16 Wis. 609.

[17] Carlisle v. McAlester, 3 In Ter. 164, 53 S. W. 531; Garvin Paul, 47 N. H. 158; Donald v. Ca penter, 8 Tex. Civ. App. 321, 27 W. 1053; Jones & Nixon v. Fir State Bank of Hamlin (Tex.), 1 S. W. 202.

[18] Bullock v. Hubbard, 23 Cal. 4 83 Am. Dec. 130; Conroy v. Woo 13 Cal. 626, 73 Am. Dec. 605; Witt v. Richards, 10 Conn. 37; Fargo Ames, 45 Iowa 491; Cox v. Russe 44 Iowa 556; Walter v. Herman, 1 Ky. 800, 62 S. W. 857, 22 Ky. L. 74 Montross v. Byrd, 6 La. Ann. 51 Smith v. Barker, 10 Maine 458; Pe v. Fisher, 7 Cush. (Mass.) 386; Ph lips v. Bridge, 11 Mass. 242; Pier v. Jackson, 6 Mass. 242; First N Bank v. Brenneisen, 97 Mo. 145, 10 W. 884; Hargadine-McKittrick D Goods Co. v. Sappington, 105 M App. 655, 78 S. W. 1049; Tenney Johnson, 43 N. H. 144; Putnam Loeb, 2 Ohio Cir. Ct. R. 110, 1 Oh Cir. Dec. 391; Adams v. Hunter, Leg. Int. (Pa.) 205; Straus v. Ker good, 21 Grat. (Va.) 584; Powe v. Large, 69 Wis. 621, 35 N. W. 2 Am. St. 767.

[19] Cunningham v. Gushee, 73 Mai 417; Allen v. Wells, 22 Pick. (Mas 450, 33 Am. Dec. 757.

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partner.[20] And in equity it seems the creditors of an insolvent partnership have a prior right to the firm assets over creditors of individual partners who have attached such assets.[21] An attachment to secure a partnership debt is preferred to a subsequent attachment to secure an individual debt, subsequently contracted.[22] An attachment by a firm creditor takes precedence over a mortgage by one partner of his interest to secure his individual debt.[23] Where one partner furnished material for the partnership business, title to which was to remain in him until he was repaid, such property could not be attached for the other partner's debt.[24] If there is a wrongful attachment against a partnership, as where one partner colludes with a creditor, the wronged partners may sue for damages.[25] Where an attachment employed in the collection of a firm claim is wrongful, all the partners will be liable in damages.[26] A garnishment of one member of a partnership by a plaintiff in an action against one to whom the firm is indebted, will not hold the debt due the firm.[27] But if all the partners are made garnishees, service on the resident partners will hold funds in their hands due the debtor.[28] In some states service on one partner is sufficient.[29]

[20] Purdy v. Hood, 5 Mart. (N. S.) (La.) 626.

[21] Washburn v. Bellows Falls Bank, 19 Vt. 278.

[22] Miles v. Pennock, 50 N. H. 564.

[23] Harvey v. Stephens, 159 Mo. 486, 60 S. W. 1055.

[24] Day v. Weyant, 72 Ore. 215, 143 Pac. 891.

[25] Grimes v. Bowerman, 92 Mich. 258, 52 N. W. 751; Vandenburgh v. Bassett, 4 Minn. 242; Trafford v. Hubbard, 15 R. I. 326, 4 Atl. 762, 8 Atl. 690; Barker v. Abbott, 2 Tex. Civ. App. 147, 21 S. W. 72.

[26] Kuhn v. Weil, 73 Mo. 213; Gurler v. Wood, 16 N. H. 539.

[27] Ellicott v. Smith, Fed. Cas. No. 4387, 2 Cranch (C. C.) 543; Reid v. McLeod, 20 Ala. 576; Hoskins v. Johnson, 24 Ga. 625; Wilson v. Albright, 2 G. Greene (Iowa) 125; Nash v. Brophy, 13 Metc. (Mass.) 476; Warner v. Perkins, 8 Cush. (Mass.) 518; Hoyt v. Robinson, 10 Gray (Mass.) 371; Jewett v. Bacon, 6 Mass. 60; Hirth v. Pfeifle, 42 Mich. 31, 3 N. W. 239; Wetherwax v. Paine, 2 Mich. 555; Hudson v. Hunt, 5 N. H. 538; Rix v. Elliot, 1 N. H. 184. Contra: Brealsford v. Meade, 1 Yeates (Pa.) 488.

[28] Macomber v. Wright, 35 Maine 156; Warner v. Perkins, 8 Cush. (Mass.) 518; Parker v. Danforth, 16 Mass. 299; Atkins v. Prescott, 10 N. H. 120; Peck v. Barnum, 24 Vt. 75.

[29] Hinkley v. St. Anthony Falls

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If a void (as by less than all members or not including individual property) or fraudulent assignment has been made of partnership property for benefit of creditors, this does not prevent creditors of the partnership from attaching the property.[30] Nor will proceedings in insolvency by one partner dissolve an attachment against firm property.[31] A void or fraudulent assignment of his property by one partner will not prevent its attachment for firm debts.[32]

§ 821. Charging partner's interest under Uniform Partnership Act.—The Uniform Partnership Act makes some notable changes in the rights of creditors of a partner to subject firm property to individual debts. Partnership property may be attached only for firm debts, and is not subject to attachment or execution for the debt of an individual partner.[33] In lieu of attachment or execution the act provides for the issuance of a charging order by a competent court, entitling the creditor of a partner to receive his share of the profits until the debt is paid. The provisions of the act are: Section 28. "(1) On due application to a competent court by any judgment creditor of a partner, the court which entered the judgment, order, or decree, or any other court, may charge the interest of the debtor partner with payment of the unsatisfied amount of such judgment debt with interest thereon; and may then or later appoint a receiver of his share of the profits, and of any other money due or to fall due to him in respect of the partnership, and make all other orders, directions, accounts and inquiries which the debtor partner might have made, or which the circumstances of the case may require.

Water Power Co., 9 Minn. 55; State v. Linaweaver, 3 Head (Tenn.) 51, 75 Am. Dec. 757.

[30] Kennedy v. McKee, 142 U. S. 606, 35 L. ed. 1131, 12 Sup. Ct. 303; May v. Walker, 35 Minn. 194, 28 N. W. 252; Wyles v. Beals, 1 Gray (Mass.) 233.

[31] Fern v. Cushing, 4 Cush. (Mass.) 357; Allen v. Wells, 22 Pick. (Mass.) 450, 33 Am. Dec. 757; Still v. Focke, 66 Tex. 715, 2 S. W. 59.

[32] Collier v. Hanna, 71 Md. 253, 17 Atl. 1017; Sellew v. Chrisfield, 1 Handy (Ohio) 86, 12 Ohio Dec. 41; Cleveland v. Battle, 68 Tex. 111, 3 S. W. 681.

[33] Uniform Partnership Act, § 25 (c).

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(2) The interest charged may be redeemed at any time before foreclosure, or in case of a sale being directed by the court may be purchased without thereby causing a dissolution: (a) With separate property, by any one or more of the partners, or (b) with partnership property, by any one or more of the partners with the consent of all the partners whose interests are not so charged or sold. (3) Nothing in this act shall be held to deprive a partner of his right, if any, under the exemption laws, as regards his interest in the partnership."

§ 822. **Arrest.**—The members of a firm are subject to arrest in a proper case and each partner who has been guilty of any wrongdoing in the course of firm business for which arrest is authorized, may be thus apprehended and taken into custody.[34] But an innocent partner who took no part in an act of his copartner in the course of firm business, which would authorize the latter's arrest, and who has not ratified it, not being actually and intentionally guilty, is not subject to arrest for his copartner's act.[35]

§ 823. **Injunction and receiver.**—Generally, a creditor of a partnership who has not obtained a judgment or levy has no right to an injunction against a sale by individual creditors of firm property.[36] But partnership creditors who have a valid attachment have been held entitled to an injunction against such sale.[37] In some jurisdictions it is held that when an attachment is

[34] Faulkner v. Whitaker, 15 N. J. L. 438; Hitchcock v. Peterson, 14 Hun (N. Y.) 389; Townsend v. Bogart, 11 Abb. Pr. (N. Y.) 335; Boykin v. Maddrey, 114 N. Car. 89, 19 S. E. 106; Gregg v. Hilsen, 34 Leg. Int. 20, 12 Phila. (Pa.) 348.

[35] Watson v. Hinchman, 42 Mich. 27, 3 N. W. 236; Bacon v. Kendall, 49 N. Y. Super. Ct. 123; National Bank v. Temple, 39 How. Pr. (N. Y.) 432; Hanover Co. v. Sheldon, 9 Abb. Pr. (N. Y.) 240; Boykin v. Maddrey, 114 N. Car. 89, 19 S. E. 106. But see Townsend v. Bogart, 11 Abb. Pr. (N. Y.) 355; Sherman v. Smith, 42 How. Pr. (N. Y.) 198.

[36] Jones v. Lusk, 2 Met. (Ky.) 356; Young v. Frier, 9 N. J. Eq. 465; Henderson v. Haddon, 12 Rich Eq. (S. Car.) 393; Lamoille Valley R. Co. v. Bixby, 55 Vt. 235.

[37] Schuster v. Rader, 13 Colo. 329, 22 Pac. 505; Fairbanks v. Kraft, 43 Mo. App. 121.

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levied on firm property for the debts of an individual partner, the other partners have the right to a bill for an accounting, and an injunction against the seizure and sale of the property under the attachment prior to the accounting.[38] In other jurisdictions there is no right to such injunction.[39] While in others it is allowed only where the firm is insolvent and the partner has no interest in the firm property.[40] Where the partners have all surrendered their interest to a third person agreeing not to interfere in his management of the business, the purchaser of a partner's interest may have injunction to prevent their interference.[41] A general creditor of the firm ordinarily has no right to have a receiver appointed,[42] unless it is apparent that he would sustain great and irreparable injury because of fraudulent misconduct of the firm or of some partners.[43] If the firm is insolvent, the appointment of a receiver is in effect an assignment for benefit of creditors.[44] The duty of a receiver ordinarily is to take charge of all the firm assets, to collect debts of the firm and use such money to pay expenses of the receivership, and liquidate creditor's claims.[45] A receiver may be authorized to continue the business,[46] and where a receiver continues business with the consent of creditors, creditors of the receiver are entitled to priority.[47] Failure of one

[38] Parker v. Merritt, 105 Ill. 293; Hubbard v. Curtis, 8 Iowa 1, 74 Am. Dec. 283; Crooker v. Crooker, 46 Maine 250; Place v. Sweetzer, 16 Ohio 142; White v. Parish, 20 Tex. 688, 73 Am. Dec. 204; Jackson v. Stanhope, 10 Jur. (O. S.) 676; Bevan v. Lewis, 1 Sim. 376.

[39] Daniel v. Owens, 70 Ala. 297; Brewster v. Hammet, 4 Conn. 540; Wickham v. Davis, 24 Minn. 167; Moody v. Payne, 2 Johns. Ch. (N. Y.) 548.

[40] Peck v. Schultze, 1 Holmes 28, Fed. Cas. No. 10895; Turner v. Smith, 1 Abb. Pr. (N. S.) (N. Y.) 304; Mowbray v. Lawrence, 22 How. Pr. 107, 13 Abb. Prac. (N. Y.) 317.

[41] Young v. Mock, 79 Miss. 714, 31 So. 423.

[42] Crippen v. Hudson, 13 N. Y. 161.

[43] Sanderson v. Stockdale, 11 Md. 563; State v. Dickinson, 59 Nebr. 753, 82 N. W. 16; Sobernheimer v. Wheeler, 45 N. J. Eq. 614, 18 Atl. 234; Jones v. Meyer Bros. Drug Co., 25 Tex. Civ. App. 234, 61 S. W. 553.

[44] Winslow v. Wallace, 116 Ind. 317, 17 N. E. 923, 1 L. R. A. 179.

[45] Wallace v. Milligan, 110 Ind. 498, 11 N. E. 599; Fogg v. Tyler, 111 Maine 546, 90 Atl. 481.

[46] Blythe v. Gibbons, 141 Ind. 332, 35 N. E. 557.

[47] Ivie v. Blum, 159 N. Car. 121, 74 S. E. 807.

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member of a firm to join in a deed of assignment for benefit of creditors and his denial of membership in the firm, is not ground for a receivership.[48]

§ 824. **Defenses.**—If one of the partners is disqualified to sue on a firm claim an action at law can not be maintained thereon.[49] As said in a representative case:[50] "The principle that all the partners must be entitled to recover, or the action can not be maintained, is fully recognized in the American courts, and indeed, so far as I have observed, has never been denied where the common law of England prevails.[51] As it is the established rule that all the partners must be entitled to recover, in order to maintain the suit, any act of one partner, whether done before or after the dissolution of the firm, that will bar him, will equally preclude the partnership from bringing an action at law in the name of all the partners. The transfer of the judgment to Cunningham is binding on Estill, and he therefore can not recover of the defendant on the ground that he had a lien on the judgment for fees due to the firm of Cochran & Estill; and as Estill can not recover, it follows that a suit at law can not be maintained in the name of Cochran & Estill." The reason is that a cause of action by a partnership is joint, all must be entitled to recover in order to sue, and if one partner has done something by reason of which he would not be entitled to sue, he can not acquire such right by joining others with him. So if one partner has assented to a trespass in firm property, the others can

[48] Wilson v. Hawker Lumber Co., 74 W. Va. 65, 81 S. E. 568.

[49] Cochran v. Cunningham, 16 Ala. 448, 50 Am. Dec. 186; McLane v. Sharpe, 2 Harr. (Del.) 481; Church v. First Nat. Bank, 87 Ill. 68; Blodgett v. Sleeper, 67 Maine 499; Farley v. Lovell, 103 Mass. 387; Myrick v. Dame, 9 Cush. (Mass.) 248; Weaver v. Rogers, 44 N. H. 112; Morse v. Bellows, 7 N. H. 549, 28 Am. Dec. 372; Craig v. Hulschizer, 34 N. J. L. 363; Wells v. Mitchell, 1 Ired. L. (N. Car.) 484; Salmon v. Davis, 4 Binn. (Pa.) 375, 5 Am. Dec. 410; Cornells v. Stanhope, 14 R. I. 97; Estabrook v. Messersmith, 18 Wis. 545; Wallace v. Kelsall, 7 M. & W. 264; Jones v. Yates, 9 B. & C. 532, 17 E. C. L. 532.

[50] Cochran v. Cunningham, 16 Ala. 448, 50 Am. Dec. 186.

[51] Citing: Story Partnership, ch. 12, pp. 360-365; The Society v. Wheeler, 2 Gall. (U. S.) 105; Griswold v. Waddington, 15 Johns. (N. Y.) 438.

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not recover.[52] If persons sue as partners it is a defense that they had formed a corporation, and the liability was contracted with the corporation.[53] Ordinarily a judgment against a partnership sued as a corporation, is not binding on the partners.[54] It may be a defense as to one partner that he has given notice to the party bringing the action that he will not be bound by the acts of his copartner. "It is a well established principle that the contract of a partner is obligatory on his copartner, by virtue of an implied authority which may be rebutted by a refusal to be bound by his acts. By legal consequence, the partner whose authority is thus declined can not bind the copartnership in favor of those who have knowledge of this fact. Nothing can be more reasonable than that a person may protect himself in this manner against the fraud and misconduct of his associate. The principle under consideration is not founded at all on any supposed waiver by the creditor; but solely and exclusively on the declaration of the person declining to be bound. The implied authority of his partner he has annihilated; and the contract in the name of the firm is of no validity beyond the personal obligation it infers on the individual making it."[55] Usually, when one partner interposes the defense of the statute of limitations in an action against him and his copartners, it is held that such defense does not inure to the benefit of any copartners as to whom the statute has not run.[56] But if one partner by concealment prevents the statute from running as to him, it will not run in favor of a copartner.[57] A creditor by long delay or laches may lose his right to assert a claim against a retiring partner, as where he has accepted a continuing partner for the debt.[58]

[52] Sindelar v. Walker, 35 Ill. App. 607 (affd. 137 Ill. 43, 27 N. E. 59, 31 Am. St. 353).

[53] Hamilton v. James A. Cushman Mfg. Co., 15 Tex. Civ. App. 338, 39 S. W. 641.

[54] Sinsabaugh v. Dun, 214 Ill. 70, 73 N. E. 390.

[55] Leavitt v. Peck, 3 Conn. 125, 8 Am. Dec. 157. Citing: Galway v. Matthew, 1 Campb. 403; Gallway v. Mathew, 10 East 264; Willis v. Dyson, 1 Stark. 164.

[56] Harrison v. McCormick, 122 Cal. 651, 55 Pac. 592; Fish v. Farwell, 160 Ill. 236, 43 N. E. 367.

[57] McCoon v. Galbraith, 29 Pa. St. 293.

[58] Consaulus v. McConihe, 49 Hun 609, 2 N. Y. S. 89, 17 N. Y. St. 538.

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§ 825. Trial.—Questions of law presented by pleadings or undisputed evidence are to be determined by the court.[59] Questions of fact are for the jury.[60] If the facts are undisputed it is a question of law as to what is a partnership, and the court must determine whether there is evidence on that question sufficient to go to the jury.[61] If there is any conflict in the evidence or if it is susceptible of more than one inference, it is for the jury to say in a particular case, under instructions from the court whether a partnership exists.[62] The intention of the parties

[59] Desha v. Stewart, 6 Ala. 852; Janney v. Springer, 78 Iowa 67, 43 N. W. 461, 16 Am. St. 460; Cook v. Blake, 98 Mich. 389, 57 N. W. 249; Sedalia Third Nat. Bank v. Faults, 115 Mo. App. 42, 90 S. W. 755; Elmira Iron &c. Rolling-Mill Co. v. Harris, 124 N. Y. 280, 26 N. E. 541, 3 Silvernail Ct. App. 351; Harris v. Wilson, 7 Wend. (N. Y.) 57; Miner v. Downer, 19 Vt. 14; Hogan v. Cushing, 49 Wis. 169, 5 N. W. 490.

[60] Dorough v. Harrington, 148 Ala. 305, 42 So. 557; Ellis v. Allen, 80 Ala. 515, 2 So. 676; Bonnell v. Chamberlin, 26 Conn. 487; Leavitt v. Peck, 3 Conn. 124, 8 Am. Dec. 157; Maynard v. Ponder, 75 Ga. 664; Gray's Harbor Commercial Co. v. Weise, 86 Ill. App. 125; McMillan v. Hadley, 78 Ind. 590; Flower v. Williams, 1 La. 22; Duran v. Ayer, 67 Maine 145; Berry v. Pelneault, 188 Mass. 413, 74 N. E. 917; Woods v. Woods, 127 Mass. 141; Beckwith v. Mace, 140 Mich. 157, 103 N. W. 559; Davis v. Smith, 27 Minn. 390, 7 N. W. 731; Blackston Mercantile Co. v. McPherson, 77 Miss. 403, 27 So. 523; Frowein v. Haysler, 87 Mo. App. 310; Ball v. Beaumont, 73 Nebr. 174, 102 N. W. 264; Webster v. Stearns, 44 N. H. 498; Lowry v. Tivy, 71 N. J. L. 681, 60 Atl. 1134 (affg. 70 N. J. L. 457, 57 Atl. 267); Sterrett v. Buffalo Third Nat. Bank, 122 N. Y. 659, 25 N. E. 913 (affg. 26 Hun (N. Y.) 22); Bulger v. Rosa, 119 N. Y. 459, 24 N. E. 853; Pirie v. Gillitt, 2 N. Dak. 255, 50 N. W. 710; Cassidy v. Saline County Bank, 14 Okla. 532, 78 Pac. 324; Sweeney v. Girolo, 154 Pa. St. 609, 26 Atl. 600; Gates v. Watt, 127 Pa. St. 20, 17 Atl. 451; O. S. Kelly Co. v. Zarecor (Tenn. Ch. App.), 62 S. W. 189; Hunter v. Hubbard, 26 Tex. 537; Jones v. Booth, 10 Vt. 268; Standard Bank v. Frind, 14 Ont. Pr. 355.

[61] Stundon v. Dahlenberg, 184 Mo. 381, 171 S. W. 37; Thornton v. Mersereau, 168 Mo. App. 1, 151 S. W. 212; Coody v. Shawver (Tex. Civ. App.), 161 S. W. 935. See ante § 103.

[62] Watson v. Farley, 85 Conn. 705, 82 Atl. 189; Doggett v. Jordan, 2 Fla. 541; Hutchinson Shoe Co. v. Elko Mercantile Co., 143 Ga. 170, 84 S. E. 453; Cary v. Simpson, 15 Ga. App. 280, 82 S. E. 918; McMullan v. Mackenzie, 2 Greene (Iowa) 368; Robertson v. Willhoite, 157 Ky. 58, 162 S. W. 563; Negaunee First Nat. Bank v. Freeman, 47 Mich. 408, 11 N. W. 219; McGray v. Cobb, 130 Minn. 434, 152 N. W. 262; Simmons v. Ingram, 78 Mo. App. 603; Carson v. Culver, 78 Mo. App. 597; Waggoner v. Creighton First Nat. Bank, 43 Nebr.

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may be a question of fact for the jury;[63] likewise the question as to whether certain property was intended to be held as firm property;[64] or whether a transaction by a partner is within the scope of his authority;[65] or whether a partner ratified a copartner's act;[66] or had by his conduct estopped himself from denying partnership liability.[67] It is the court's duty to instruct the jury correctly in the law applicable to the rights and liabilities of partners in the particular case being tried,[68] to refuse requests for

84, 61 N. W. 112; Benoliel v. Homac (N. J.), 94 Atl. 605; Seabury v. Bolles, 51 N. J. L. 103, 16 Atl. 54, 11 L. R. A. 136; Sheehan v. Fleetham, 58 Hun 605, 12 N. Y. S. 158, 34 N. Y. St. 665; Drake v. Elwyn, 1 Caines (N. Y.) 184; Mendonca v. Russel (Okla.), 150 Pac. 1061; Providence Mach. Co. v. Browning, 68 S. Car. 1, 46 S. E. 550; Dulany v. Elford, 22 S. Car. 304; Texas &c. R. Co. v. Missouri Iron & Metal Co. (Tex. Civ. App.), 178 S. W. 597; Look v. Bailey (Tex. Civ. App.), 164 S. W. 407; Manegold v. Grange, 70 Wis. 575, 36 N. W. 263; Gurney v. Evans, 3 H. & N. 122, 27 L. J. Exch. 166.

[63] Branch v. Doane, 17 Conn. 402; Phillips v. Trowbridge Furniture Co., 92 Ga. 596, 20 S. E. 4; Hartwell v. Becker, 181 Mo. App. 408, 168 S. W. 837; Meriden Nat. Bank v. Gallaudet, 120 N. Y. 298, 24 N. E. 994; Van Tassel v. Williams, 76 Hun (N. Y.) 503, 59 N. Y. St. 369, 27 N. Y. S. 1067.

[64] Gossett v. Morrow, 187 Ala. 387, 65 So. 826; Dorough v. Harrington, 148 Ala. 305, 42 So. 557; City Bank's Appeal, 54 Conn. 269; Heidenreich v. Bremner, 260 Ill. 439, 103 N. E. 275; Ernest v. Wible, 10 Pa. Super. Ct. 576; Merchants' Nat. Bank v. Stebbins, 15 S. Dak. 280, 89 N. W. 674.

[65] Irwin v. Williar, 110 U. S. 499, 4 S. Ct. 160, 28 L. ed. 225; Jones v. Burks, 110 Ark. 108, 161 S. W. 177; Morris v. Marqueze, 74 Ga. 86; Jordan v. Ingram, 57 Ga. 92; Lynch v. Hillstrom, 64 Minn. 521, 67 N. W. 636; Hefferlin v. Karlman, 29 Mont. 139, 74 Pac. 201; G. H. Haulenbeck Advertising Agency v. November, 27 Misc. 836, 60 N. Y. S. 573; Loudon Sav. Fund. Soc. v. Hagerstown Sav. Bank, 36 Pa. St. 498, 78 Am. Dec. 390.

[66] Wile, Weill & Co. v. Denison Clothing Co., 158 Iowa 109, 138 N. W. 1098.

[67] Phipps v. Little, 213 Mass. 414, 100 N. E. 615; Brown v. First Nat. Bank, 35 Okla. 726, 130 Pac. 140.

[68] Levy v. Alexander, 95 Ala. 101, 10 So. 394; Planters' Trading Co. v. Moore, 7 Ala. App. 393, 62 So. 302; Herman Kahn & Co. v. Bowden, 80 Ark. 23, 96 S. W. 126; Ashenfelter v. Williams, 12 Colo. App. 345, 55 Pac. 734; Crane v. Tierney, 175 Ill. 79, 51 N. E. 715; Jones v. Austin, 26 Ind. App. 399, 59 N. E. 1082; Sheldon v. Bigelow, 118 Iowa 586, 92 N. W. 701; Weeks v. Hutchinson, 135 Mich. 160, 97 N. W. 695; McPherson v. Bristol, 115 Mich. 258, 73 N. W. 236; Conely v. Wood, 73 Mich. 203, 41 N. W. 259; Connolly v. Davidson, 15 Minn. 519, 2 Am. Rep. 154; A. Graf. Distilling Co. v.

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improper instructions;[69] to tell the jury what questions are to be decided by it, and what are for the court to decide;[70] and in some jurisdictions to explain to the jury the probative force of the evidence.[71] If a verdict is unsupported by evidence the court may set it aside,[72] or direct a verdict where but one conclusion is possible from the evidence;[73] or decide whether the verdict is in

Wilson, 172 Mo. App. 612, 156 S. W. 23; Watts v. Pierson, 170 Mo. App. 532, 156 S. W. 724; Lawrence v. Westlake, 28 Mont. 503, 73 Pac. 119; McKibbin v. Day, 71 Nebr. 280, 98 N. W. 845; Knickerbocker Ice Co. v. Theiss, 23 Misc. (N. Y.) 625, 52 N. Y. S. 163; Entwisle v. Carey, 9 Sad. (Pa.) 423, 12 Atl. 768; Moore v. Williams, 26 Tex. Civ. App. 142, 62 S. W. 977, 31 Tex. Civ. App. 287, 72 S. W. 222; Haight v. Turner, 44 Tex. Civ. App. 595, 99 S. W. 196; Cary v. Simpson & Harper, 15 Ga. App. 280, 82 S. E. 918; Coody v. Shawver (Tex. Civ. App.), 161 S. W. 935.

[69] Rector v. Robins, 74 Ark. 437, 86 S. W. 667; Clark v. Ball, 34 Colo. 223, 82 Pac. 529, 114 Am. St. 154, 2 L. R. A. (N. S.) 100; McDonald v. Clough, 10 Colo. 59, 14 Pac. 121; Boardman v. Adams, 5 Iowa 224; Humphrey v. Mattox, 19 Ky. L. 1053, 42 S. W. 1100; Smith v. Smith, 93 Maine 253, 44 Atl. 905; White v. McPeck, 185 Mass. 451, 70 N. E. 463; Hodel-Mutti Mfg. Co. v. Ham, 112 Mo. App. 718, 87 S. W. 608; Tamblyn v. Scott, 111 Mo. App. 46, 85 S. W. 918; Costet v. Jeantet, 108 App. Div. 201, 95 N. Y. S. 638; Teller v. Patten, 20 How. (U. S.) 125, 15 L. ed. 831; Winston v. Ibanez (Mass.), 106 N. E. 141; Coody v. Shawver (Tex. Civ. App.), 161 S. W. 935.

[70] Edwards v. Parker, 88 Ala. 356, 6 So. 684; Schmidt v. Balling, 91 Ill. App. 388; Hewes v. Parkman, 20 Pick. (Mass.) 90; Conely v. Wood, 73 Mich. 203, 41 N. W. 259; Chase v. Stevens, 19 N. H. 465; McVicker v. Cone, 21 Ore. 353, 28 Pac. 76; Moore v. May, 117 Wis. 192, 94 N. W. 45; De Mantort v. Saunders, 1 B. & Ad. 398.

[71] Robinson v. Parker, 11 App. Cas. (D. C.) 132; Daugherty v. Heckard, 189 Ill. 239, 59 N. E. 569; Shapard Grocery Co. v. Hynes, 3 Ind. Ter. 74, 53 S. W. 486; Humphrey v. Mattox, 19 Ky. L. 1053, 42 S. W. 1100; Woodward v. Winship, 12 Pick. (Mass.) 430; Weeks v. Hutchinson, 135 Mich. 160, 97 N. W. 695; Hagmayer v. Armbruster, 35 Misc. (N. Y.) 378, 71 N. Y. S. 1029; Barrett v. McCrummen, 128 N. Car. 81, 38 S. E. 286; Frisbie v. McFarlane, 196 Pa. St. 110, 46 Atl. 359; Nolan County v. Simpson, 74 Tex. 218, 11 S. W. 1098; Breeze v. International Banking Corporation, 25 Cal. App. 437, 143 Pac. 1066.

[72] Bosworth v. West, 68 Ga. 825; O. S. Kelly Co. v. Zarecor (Tenn. Ch. App.), 62 S. W. 189.

[73] M. W. Powell Co. v. Finn, 198 Ill. 567, 64 N. E. 1036 (affg. 101 Ill. App. 512); Thompson v. Piot, 52 Pa. Super. Ct. 305; Holliday v. Pegram, 89 S. Car. 73, 71 S. E. 367, Ann. Cas. 1913 A, 33n.

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proper form;[75] or whether the evidence supports the verdict.[76]

§ 826. Judgment.—Generally speaking, judgment in an action against a partnership should be rendered against the individual partners,[77] though if the statute provides that a judgment may be entered against a partnership in its firm name, it can not be entered against an individual partner,[78] but an action may be brought on the judgment against an individual partner.[79] A judgment against the Wahounia Drug Company is sufficient under the Alabama statute, the name importing a partnership,[80] and a judgment against W & J, "former partners doing business under the name and style of the H company" is against the partners individually, as well as the firm.[81] The general rule is that where a plaintiff brings an action against a number of persons, charging them as partners, and proves partnership liability as to only a part of them, he is entitled to judgment against those as to whom liability is proved,[82] and this more especially if the action

[75] Austin v. Appling, 88 Ga. 54, 13 S. E. 955; Gill v. Bickel, 10 Tex. Civ. App. 67, 30 S. W. 919; Matthies v. Herth, 31 Wash. 665, 72 Pac. 480; Cornhauser v. Roberts, 75 Wis. 554, 44 N. W. 744.

[76] Ziegenhein v. Smith, 116 Ill. App. 80; Masterson v. Heitmann (Tex. Civ. App.), 87 S. W. 227; Mitchell v. Jensen, 29 Utah 346, 81 Pac. 165.

[77] Meyer v. Wilson, 166 Ind. 651, 76 N. E. 748; Glasscock v. Price, 92 Tex. 271, 47 S. W. 965; Weimer v. Rector, 43 W. Va. 735, 28 S. E. 716; Moore v. Dickson, 121 Wis. 591, 99 N. W. 322.

[78] Ellsberry v. Block, 28 Colo. 477, 65 Pac. 629; Howes v. Patterson, 76 Ga. 689; Marsh v. Mead, 57 Iowa 535, 10 N. W. 922; Adkins v. Arthur, 33 Tex. 431; Jackson v. Litchfield, 8 Q. B. D. 474.

[79] Cox v. Harris, 48 Ala. 538; Ruth v. Lowry, 10 Nebr. 260, 4 N. W. 977; Clark v. Cullen, 9 Q. B. Div. 355.

[80] Wahouma Drug Co. v. Clay (Ala.), 69 So. 82.

[81] Clark v. Johnson, 7 Ala. App. 507, 61 So. 34.

[82] Longstreet v. Rea, 52 Ala. 195; Salomon v. Hopkins, 61 Conn. 47, 23 Atl. 716; Doody Co. v. Jeffcoat, 127 Ga. 301, 56 S. E. 421; Silvers v. Foster, 9 Kans. 56; Fersner v. Bradley, 87 Md. 488, 40 Atl. 58; Taft v. Church, 164 Mass. 504, 41 N. E. 671, under Pub. Stat. ch. 117, § 5, changing the rule in Tuttle v. Cooper, 10 Pick. (Mass.) 281. See also Jewison v. Dieudonne, 127 Minn. 163, 149 N. W. 20; Bunce v. Pratt, 56 Minn. 8, 57 N. W. 160; Crews v. Lackland, 67 Mo. 619; Tirry v. Hogan (Mo. App.), 163 S. W. 873; Roggenkamp v. Hargreaves, 39 Nebr. 540, 58 N. W. 162: Gay v. Johnson, 32 N. H. 167; Pruyn v. Black, 21 N.

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is in tort,[83] but this is not allowed, where plaintiff has counted on a joint promise of all the partners.[84] And if the proof establishes liability of all, there is no right to a judgment against part of them, unless permitted by statute.[85] If the suit is against partners the judgment should not be rendered in the firm name. Though the full names of partners should appear in the judgment,[86] irregularities in such respect are not always held material.[87] Where plaintiffs sued as a firm in an action for damages to a shipment of horses consigned by the firm, a joint judgment in favor of them as the individual members of the firm was not erroneous, the evidence being conflicting as to whether the horses belonged to the firm, or part of them belonged to one partner and the rest to the other.[88] The nature and extent of the liability

Y. 300; Rogers v. Ingersoll, 103 App. Div. 490, 93 N. Y. S. 140 (affd. 185 N. Y. 592, 78 N. E. 1111); Moses v. Dulles, 8 Leg. Int. (Pa.) 14; North Star Boot &c. Co. v. Stebbins, 3 S. Dak. 540, 54 N. W. 593; Willis v. Morrison, 44 Tex. 27; Armour v. Ward, 78 Vt. 60, 61 Atl. 765; Little v. Staples, 98 Wis. 344, 73 N. W. 653; Darwent v. Walton, 2 Atk. 510, 26 Eng. Reprint 707; Walker v. Lamoureux, 13 Quebec K. B. 209.

[83] Austin v. Appling, 88 Ga. 54, 13 S. E. 955; Swenson v. Erickson, 90 Ill. App. 358; In re Blackford, 35 App. Div. 330, 54 N. Y. S. 972.

[84] Blythe v. Cordingly, 20 Colo. App. 508, 80 Pac. 495; Gribbin v. Thompson, 28 Ill. 61; Rose v. Comstock, 17 Ind. 1; Beatty v. O'Connor, 2 Ind. App. 337, 27 N. E. 446; Ogle v. Miller, 128 Iowa 474, 104 N. W. 502; Brandagee v. Cleary, 152 N. Y. S. 628.

[85] New York Fastener Co. v. Wilatus, 65 App. Div. 467, 73 N. Y. S. 67; Teller v. Gerry, 30 Misc. 126, 61 N. Y. S. 864; Nelson v. Lloyd, 9 Watts (Pa.) 22; Pope Mfg. Co. v. Charleston Cycle Co., 55 S. Car. 528, 33 S. E. 20; Geddes v. Simpson, 2 Bay (S. Car.) 533; La Societe Francaise v. Weidmann, 97 Cal. 507, 32 Pac. 583; Poswa v. Jones, 21 Cal. App. 664, 132 Pac. 629; Tramel v. Guaranty State Bank &c. Co. (Tex. Civ. App.), 176 S. W. 65; Olson v. Veazie, 9 Wash. 481, 37 Pac. 677, 43 Am. St. 855.

[86] Lanford v. Patton, 44 Ala. 584; Gardner v. Austin, 14 Pa. Co. Ct. 549; Wright v. McCampbell, 75 Tex. 644, 13 S. W. 293.

[87] McNamee v. Huffman, 3 Harr. (Del.) 425; Loyd v. Hicks, 31 Ga. 140; Downard v. Sluder, 5 Blackf. (Ind.) 559; Commonwealth v. Miller, 6 Dana (Ky.) 315; McCouns v. Holmes, 4 Litt. (Ky.) 389; Presley v. Anderson, 42 Miss. 274; Davis v. Kline, 76 Mo. 310; Lash v. Arnold, 53 N. Car. 206; Brooks v. Ratcliff, 33 N. Car. 321; Rice v. Summers, 2 Pa. Dist. 31; Justice v. Meeker, 30 Pa. Super. Ct. 207; McIndoe v. Hazelton, 19 Wis. 567, 88 Am. Dec. 701.

[88] Quanah A. & P. R. Co. v. Chumbley (Tex. Civ. App.), 169 S. W. 1107.

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of partners on firm judgments has been previously treated in the chapter on liabilities as to third persons, where it was seen that such judgment can be enforced as to the firm property, or as to the separate property of each partner,[89] and that where the liability of partners on an obligation is joint, a judgment against part of the partners extinguishes the liability of the others.[90] At common law there can be no valid judgment against a partner not served with process.[91] A contrary rule prevails under statute in many states, and in some states the plaintiff who proceeds against the number of joint defendants served is entitled to judgment against all the defendants jointly indebted which may be enforced against the joint property of all and the individual property of those served,[92] while under other statutes judgment

[89] Hamsmith v. Espy, 13 Iowa 439; Stevens v. Perry, 113 Mass. 380; Meech v. Allen, 17 N. Y. 300, 72 Am. Dec. 465; Abbott v. Smith, 2 W. Bl. 947. See ante § 495 et seq.

[90] Mason v. Eldred, 6 Wall. (U. S.) 231, 18 Law ed. 783; Waun v. McNulty, 7 Ill. 355, 43 Am. Dec. 58; Crosby v. Jeroloman, 37 Ind. 264; North v. Mudge, 13 Iowa 496, 81 Am. Dec. 441; Robertson v. Smith, 18 Johns. (N. Y.) 459, 9 Am. Dec. 227; Kendall v. Hamilton, 4 App. Cas. 504. See ante § 499.

[91] Opelika v. Daniel, 49 Ala. 211; Golden State &c. Iron Works v. Davidson, 73 Cal. 389, 15 Pac. 20; Weaver v. Carpenter, 42 Iowa 343; Scott v. Dunlop, 2 Munf. (Va.) 349; McCoy v. Bell, 1 Wash. 504, 20 Pac. 595. See also Williamson v. McGinnis, 11 B. Mon. (Ky.) 74, 52 Am. Dec. 561; Scott v. Bogart, 14 La. Ann. 261; Southmayd v. Backus, 3 Conn. 474; Dennett v. Chick, 2 Greenl. (Maine) 191, 11 Am. Dec. 59; Landsberg v. Bullock, 79 Mich. 278, 44 N. W. 608.

[92] Fowlkes v. Baldwin, 2 Ala. 705; Kelly v. Bandini, 50 Cal. 530; Tay v. Hawley, 39 Cal. 93; Welsh v. Kirkpatrick, 30 Cal. 202, 89 Am. Dec. 85; Bishop v. Vose, 27 Conn. 1; Hirsch v. Fisher, 138 Mich. 95, 101 N. W. 48; Gunzberg v. Miller, 39 Mich. 80; Brooks v. McIntyre, 4 Mich. 316; Johnson v. Lough, 22 Minn. 203; Flannery v. Anderson, 4 Nev. 437; Yerkes v. McFadden, 141 N. Y. 136, 36 N. E. 7; Sternberger v. Bernheimer, 121 N. Y. 194, 24 N. E. 311; Brandagee v. Cleary, 152 N. Y. S. 628; Maneely v. Mayers, 43 Misc. 380, 87 N. Y. S. 471; Mason v. Denison, 15 Wend. (N. Y.) 64; Leahey v. Kingon, 13 Abb. Pr. (N. Y.) 192, 22 How. Pr. 209; Emery v. Emery, 9 How. Pr. (N. Y.) 130; Kidd v. Brown, 2 How. Pr. (N. Y.) 20; Pardee v. Haynes, 10 Wend. (N. Y.) 630; Lippman v. Joelson, 1 N. Y. Code (N. S.) 161, note; Daniel v. Bethell, 167 N. Car. 218, 83 S. E. 307; Goldstein v. Peter Fox Sons Co., 22 N. Dak. 636, 135 N. W. 180, 40 L. R. A. (N. S.) 566n; Heaton v. Schaefer, 34 Okla. 631, 126 Pac. 797, 43 L. R. A. (N. S.) 540n;

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against only those served is proper.[93] As a general rule, a judgment against a firm by its firm name binds only partnership property.[94] A verdict against a partnership has been held to be a verdict for each partner,[95] but a verdict against C. & S. is not necessarily, because of the use of their names in conjunction, a verdict against them as a partnership, where they were also sued as individuals.[96] If the petition in an action against a firm was sufficient to support a judgment against each partner personally, and also against the firm, a partner against whom a personal judgment was rendered has no right to complain because no personal judgment was rendered against his copartners.[97] A judgment for two partners, one of whom was not a party to the action, is invalid.[98] Where it is in issue whether one defendant is a member of a partnership and liable as such, a judgment which merely awards damages against the partnership in the firm name and does

Symms Grocer Co. v. Burnham, 6 Okla. 618, 52 Pac. 918; Pierce v. Varn, 76 S. Car. 359, 57 S. E. 184; Gessner v. Roening, 135 Wis. 535, 116 N. W. 171; Young v. Krueger, 92 Wis. 361, 66 N. W. 355.

[93] Ladiga Saw Mill Co. v. Smith, 78 Ala. 108; Shapard v. Lightfoot, 56 Ala. 506; Smith v. Robinson, 11 Ala. 270; Oliver v. Hutto, 5 Ala. 211; Burnett v. Menifee, 4 Ark. 140; Edwards v. Hellings, 103 Cal. 204, 37 Pac. 218; Feder v. Epstein, 69 Cal. 456, 10 Pac. 785; Bacon v. Green, 36 Fla. 325, 18 So. 870; Raney v. McRae, 14 Ga. 589, 60 Am. Dec. 660; Fincher v. Hanson, 12 Ga. App. 608, 77 S. E. 1068; Warren Brick Co. v. Lagarde Lime &c. Co., 12 Ga. App. 58, 76 S. E. 761; Rehm v. Halverson, 94 Ill. App. 627; Fender v. Stiles, 31 Ill. 460; Reeves v. Mercer, 155 Ill. App. 57; Hunt v. Adamson, 4 Ind. 108; Lansing v. Bever Land Co., 158 Iowa 693, 138 N. W. 833; Persons v. Oldfield, 101 Miss. 110, 57 So. 417; Dineen v. Lanning, 92 Nebr 545, 138 N. W. 759; Van Zandt v. Winters, 22 Pa. Super. Ct. 181; Dillard v. Turner, 87 Va. 669, 14 S. E. 123; Norfolk & W. R. Co. v. Shippers' Compress Co., 83 Va. 272, 2 S. E. 139; Armstrong v. Poole, 30 W. Va. 666, 5 S. E. 257; Carlon v. Ruffner, 12 W. Va. 297; Merchants' &c. Bank v. Evans, 9 W. Va. 373.

[94] Ratchford v. Covington County Stock Co., 172 Ala. 461, 55 So. 806; Baldridge v. Eason, 99 Ala. 516, 13 So. 74; Lansing v. Bever Land Co., 158 Iowa 693, 138 N. W. 833; Anderson v. Wilson, 142 Iowa 158; Houssels v. Coe (Tex. Civ. App.), 159 S. W. 864.

[95] Port Arthur Rice Milling Co. v. Beaumont Rice Mills (Tex.), 152 S. W. 629.

[96] Lilly v. Yeary (Tex. Civ. App.), 152 S. W. 823.

[97] First Bank of Springtown v. Hill (Tex.), 151 S. W. 652.

[98] Western Grocery Co. v. Jata (Tex. Civ. App.), 173 S. W. 518.

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not mention the members will be reversed at the instance of such defendant.[99] A partnership in Louisiana is a separate entity and must sue and be sued in the firm name, but its members may be joined and judgment rendered against the firm and the partners in solido.[1] At common law a judgment against all the members of a firm binds not only the firm property, but also the individual property of each partner.[2] A judgment against a partner for an individual debt binds his individual property and his interest in firm property,[3] and is therefore, as respects firm property, subordinate to any judgment of firm creditors later obtained.[4] The form of a judgment by default against a partnership is determined mainly by statute.[5] Where liability of partners is joint and several, judgment against the firm does not extinguish the liability of the partners.[6] A judgment against a firm or partner is not subject to collateral attack for invalidity,[7] but upon proper

[99] Paul v. Commercial Bank of Ocala, 66 Fla. 83, 63 So. 265.

[1] Empire Rice Mill Co. v. Neumond, 199 Fed. 800.

[2] In re Codding, 9 Fed. 849; Griffin v. Colonial Bank, 7 Ga. App. 126, 66 S. E. 382; Louden v. Ball, 93 Ind. 232; McDonald v. McDonald, 62 Hun 621, 17 N. Y. S. 230; Cardington First Nat. Bank v. Stiles, 8 Ohio Cir. Ct. 532, 4 Ohio Cir. Dec. 481; Holt's Appeal, 98 Pa. St. 257; Cumming's Appeal, 25 Pa. St. 268, 64 Am. Dec. 695; House v. Thompson, 3 Head (Tenn.) 512; Reid v. House, 2 Humph. (Tenn.) 576; State v. Cloudt (Tex. Civ. App.), 84 S. W. 415; Pitts v. Spotts, 86 Va. 71, 9 S. E. 501.

[3] Ex parte Stebbins, R. M. Charlt. (Ga.) 77; Gowan v. Tunno, Rich. Eq. (S. Car.) 369.

[4] Johnson v. Rogers, Fed. Cas. No. 7408, 15 Nat. Bankr. Reg. 1, 14 Alb. L. J. 427; Coster v. Bank of Georgia, 24 Ala. 37; Whelan v. Shain, 115 Cal. 326, 47 Pac. 57; Westbrook v. Hays, 89 Ga. 101, 14 S. E. 879; Green v. Ross, 24 Ga. 613; Dennis v. Green, 20 Ga. 386; Freedman v. Holberg, 89 Mo. App. 340; Bowen v. Billings, 13 Nebr. 439, 14 N. W. 152; Page v. Thomas, 43 Ohio St. 38, 1 N. E. 79, 54 Am. Rep. 788; Gunnison v. Erie Dime Sav. &c. Co., 157 Pa. St. 303, 27 Atl. 747.

[5] Williams v. Hurley, 135 Ala. 319, 33 So. 159; Hobson v. Emanuel, 8 Port. (Ala.) 442; Phillips v. Wheeler, 2 Hun 603, 6 Thomp. & C. (N. Y.) 306; Taylor v. Henderson, 17 Serg. & R. (Pa.) 453; Owen v. Kuhn (Tex. Civ. App.), 72 S. W. 432.

[6] Ratchford v. Covington County Stock Co., 172 Ala. 461, 55 So. 806.

[7] MacVeagh v. Wild, 95 Fed. 84; Belcher v. Curtis, 119 Mich. 1, 77 N. W. 310, 75 Am. St. 376; Wells v. Clarkson, 5 Mont. 336, 5 Pac. 894; Hough v. Stover, 46 Nebr. 588, 65 N. W. 189; Jaques v. Greenwood, 12 Abb. Pr. (N. Y.) 232; Wright v. Ewen, 19 Phila. (Pa.) 312, 24 Wkly. Notes Cas. 111; Bates v. Wills Point Bank, 11 Tex. Civ. App. 73, 32 S.

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grounds such judgment may be vacated or set aside in equity.[8] Thus, in an early case, in which this question arose, the court said:[9] "It is a well-settled principle that one partner can not charge the firm by his writing under seal, unless he is authorized to do so by the articles of copartnership, or by the express consent of his copartners. But equity can relieve against a judgment at law on such instrument against the firm, if obtained without surprise, fraud or connivance; because the copartners, who had not consented to the instrument, might have made full and effectual defense at law. But against an improper judgment surreptitiously or collusively obtained, it is the peculiar province of a court of equity to afford relief; for without the aid of equity the complainant would be remediless, having had no opportunity to defend at law. The demurrer admits the truth of all the charges and allegations in the bill, therefore I can not hesitate in concluding that this instrument of writing was intended as a fraud on the complainant, and that the judgment was obtained without his having any knowledge of the pendency of the suit, or any opportunity of making a defense. The complainant had also the right to apply to a court of equity for a discovery of the amount of the credits which ought to have been entered on the execution, and to compel the plaintiff at law to enter satisfaction pro tanto." Judgment against ostensible partners only merges and extinguishes a claim against dormant partners,[10] but binds

W. 339; Pfister v. Graton &c. Mfg. Co., 97 Wis. 208, 72 N. W. 883.

[8] Morgan v. Scott, Minor (Ala.) 81, 12 Am. Dec. 35; Ramsbottom v. Bailey, 124 Cal. 259, 56 Pac. 1036; Baltzell v. Randolph, 9 Fla. 366; Kling v. Taylor, 90 Ill. App. 165; Marsh v. Mead, 57 Iowa 535, 10 N. W. 922; Sneed v. Coyle, 4 Litt. (Ky.) 163; Granit v. Abramowitz, 112 N. Y. S. 1081; Helios-Upton Co. v. Thomas, 96 App. Div. 401, 89 N. Y. S. 222; Utter v. McLean, 53 Hun 568, 6 N. Y. S. 281, 17 N. Y. Civ. Proc. 150, 25 N. Y. St. 376; Bean v. Mather, 1 Daly (N. Y.) 440; Groesbeck v. Brown, 2 How. Pr. (N. Y.) 21; Franks v. Lockey, 45 Vt. 395; Fore St. Warehouse Co. v. Durrant, 10 Q. B. D. 471.

[9] Morgan v. Scott, Minor (Ala.) 81, 12 Am. Dec. 35.

[10] Penny v. Martin, 4 Johns. Ch. (N. Y.) 566; Smith v. Black, 9 Serg. & R. (Pa.) 142, 11 Am. Dec. 686; Munster v. Railton. 11 Q. B. D. 435, 52 L. J. Q. B. 409, 48 L. T. Rep. (N. S.) 624.

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the firm assets as much as if the dormant partner were a party.[11]

§ 827. Execution.—At common law liability on a judgment against partners for a firm debt is not joint, as is the liability on the debt, but is joint and several, and the execution may be levied on either firm property or the property of any partner.[12] As said in one case:[13] "The statute (Code, section 1369) requires the sheriff to satisfy an execution against property 'out of the personal property of the judgment debtor,' and if sufficient personal property can not be found, then out of the real property belonging to him. There is no statute or rule of law which requires the sheriff to satisfy a joint execution out of the joint property of the execution debtors, or out of the separate property of each debtor. He may satisfy such an execution out of the joint property, or out of the separate property of any one or more of the debtors. In 1 Lindley on Part. 515, it is said that 'although the writ of execution on a joint judgment must be joint in form, it may be levied upon all or any one or more of the persons named in it,' and that 'the consequence of this is, that the sheriff may execute a writ issued against several partners jointly, either on their joint property or on the separate property or any one or more of them, or both on their joint or their respective separate property. And so long as there is within the sheriff's bailiwick any property of the partners or any of them, a return of nulla bona is improper.' And the rules have now been embodied in section 1935 of the Code." In Alabama it is held that the lien of a recorded partnership judgment, is, as to the individual property of one partner, prior to the rights of his individual cred-

[11] Pinschower v. Hanks, 18 Nev. 99, 1 Pac. 454; Elliot v. Stevens, 38 N. H. 311; King's County Bank v. Courtney, 69 Hun 152, 23 N. Y. S. 542, 53 N. Y. St. 324; Tynburg v. Cohen, 67 Tex. 220, 2 S. W. 734; How v. Kane, 2 Pinn. (Wis.) 531, 2 Chandl. 222, 54 Am. Dec. 152.

[12] Clark v. Johnson, 7 Ala. App. 507, 61 So. 34; Martin v. Davis, 21 Iowa 535; Stout v. Baker, 32 Kans. 113, 4 Pac. 141; Wisham v. Lippincott, 9 N. J. Eq. 353; Hunter v. Martin, 2 Rich. L. (S. Car.) 541; DeCamp v. Bates (Tex. Civ. App.), 37 S. W. 644. See ante § 495.

[13] Saunders v. Reilly, 105 N. Y. 12, 12 N. E. 170, 59 Am. Rep. 472.

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itors.[14] But execution on a judgment against a partnership in the firm name, where statute permits such judgment, may be levied only on the firm property.[15] And where statute allows judgment against the partners served, where not all of the partners can be brought into court, such judgment may be enforced only against firm property and the property of the partners served.[16] This rule also holds where judgment has been confessed by less than all the partners.[17] But under some statutes a partner not served may be brought in after judgment and his property bound.[18]

§ 828. Injunction against enforcement of judgment against firm.—An injunction may be granted against the enforcement of a judgment against the firm confessed by one partner without his copartner's consent.[19] But the right to such injunction has been denied to a dormant partner,[20] and in some jurisdictions it is held the remedy by motion to vacate precludes an injunction.[21] Injunctions have sometimes been denied against

[14] Clark v. Johnson, 7 Ala. App. 507, 61 So. 34.

[15] Yarbrough v. Bush, 69 Ala. 170; Flowers v. Strickland, 10 Ga. App. 739, 73 S. E. 1092; Capital Food Co. v. Globe Coal Co., 142 Iowa 134, 120 N. W. 704; Fritche v. Liddell, 6 Ohio Dec. 971, 9 Am. L. Rec. 309; Halsell v. McMurphy, 86 Tex. 100, 23 S. W. 647; Rogers v. Bradford, 56 Tex. 630; Hamner v. Ballantyne, 16 Utah 436, 52 Pac. 770, 67 Am. St. 643. See as to effect of judgment obtained against a partnership as a corporation in which the partners defended as real parties in interest. Heavrin v. Lack Malleable Iron Co., 153 Ky. 329, 155 S. W. 729; Lansing v. Bever Land Co., 158 Iowa 693, 138 N. W. 833.

[16] Inbusch v. Farwell, 1 Black (U. S.) 566, 17 L. ed. 188; Flannery v. Anderson, 4 Nev. 437; Waring v. Robinson, 1 Hoffm. Ch. (N. Y.) 524; Union Pottery Co. v. Ginder, 2 Lanc. L. Rev. (Pa.) 345; Lowber v. Richardson, 1 Clark 263, 2 Pa. L. J. 203; Lee v. Hassett, 41 W. Va. 368, 23 S. E. 559. See ante § 817.

[17] Grant v. Hyatt, 22 La. Ann. 411; Ross v. Howell, 84 Pa. St. 129; Hershey v. Fulmer, 3 Pa. Co. Ct. 442; Hoover v. Diffenderfer, 5 Lanc. L. Rev. (Pa.) 245; Bank of Shelton v. Willey, 7 Wash 535, 35 Pac. 411.

[18] Daniel v. Bethell, 167 N. Car. 218, 83 S. E. 307.

[19] Christy v. Sherman, 10 Iowa 535; Blackwell v. Rankin, 7 N. J. Eq. 152; Shedd v. Bank of Brattleboro, 32 Vt. 709.

[20] Cammack v. Johnson, 2 N. J. Eq. 163.

[21] McKee v. Bank of Mt. Pleasant, 7 Ohio 522.

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the enforcement of a judgment rendered on service of process on one partner only when the other was out of the state,[22] but the contrary is also held.[23] Injunction against the enforcement of a judgment has been denied against one member of a firm and a codefendant, instead of the firm and the codefendant where entered by agreement,[24] or where appearance of one partner was entered without his authority,[25] the court holding that the remedy at law is adequate in these cases, or the judgment was in fact valid.

§ 829. Injunction against sale of partnership property, under levy against one partner.—It is sometimes held that partners may in equity prevent a sale of firm property under an execution against one partner until an accounting is had.[26] As said in one case:[27] "If the property is sold before an account is taken, of course the interest of the debtor is liable to be sacrificed on account of the uncertainty, and the purchaser is burdened with the settlement of the business of the firm. In the other mode of proceeding, the creditor takes this upon himself, and if there is no balance, there is nothing to sell. The rule is clearly summed up and stated in Eden on Injunctions, 53–55. Having stated that the subject had undergone an elaborate discussion in the case in the exchequer[28] he states the conclusion as there held: 'Whether the partner, for valuable consideration, sells his interest in the partnership, or his representatives take it upon his death, or a creditor takes it in execution, or assigns under a commission, the party coming in in the right of the partner takes nothing more than an interest in the partnership, which is not tangible, and can not be made available except under an

[22] Winters v. Means, 25 Nebr. 241, 41 N. W. 157, 13 Am. St. 489.

[23] Purviance v. Edwards, 17 Fla. 140.

[24] Crenshaw v. Wickersham, 15 Iowa 154.

[25] Lucas v. Bank of Darien, 2 Stew. (Ala.) 280; Walworth v. Henderson, 9 La. Ann. 339; Winters v. Means, 25 Nebr. 241, 41 N. W. 157, 13 Am. St. 489.

[26] Reed v. Johnson, 24 Maine 322; Thompson v. Frist, 15 Md. 24; Krupp v. Adams, 124 Mich. 215, 82 N. W. 894.

[27] Hubbard v. Curtis, 8 Iowa 1, 74 Am. Dec. 283.

[28] Taylor v. Fields, 4 Ves. 396.

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account between the partnership and the partner. The creditor will accordingly, be restrained from proceeding until such account has been taken.' This seems to be the more consistent rule, and supported by the greater weight of authority."[29] But the contrary is also held.[30] Under this rule it seems that to obtain an injunction against the sale of partnership property on an execution issued against one member, it should be made to appear that the partner will have nothing coming to him upon settlement and an offer to make an accounting should appear.[31] In several cases an injunction has been granted against the sale of specific articles of firm property for the debt of one partner.[32] But in many other cases the right to any injunction to stop execution sale of firm property for a partner's debt, has been denied, the cases holding that the risk of such sale is assumed in the partnership undertaking,[33] nor, under the Texas statute, can a partnership

[29] Fox v. Hanbury, Cowp. 445; Richardson v. Gooding, 2 Vern. 293; West v. Skip, 1 Ves. sen. 239; Hankey v. Garrat, 3 Bro. C. C. 457; Hankey v. Garrat, 1 Ves. (Jr.) 236; particularly Barker v. Goodair, 11 Ves. 78; Young v. Keighly, 15 Ves. 557; Dutton v. Morrisson, 17 Ves. 193.

[30] Moody v. Payne, 2 Johns. Ch. (N. Y.) 548.

[31] Cropper v. Coburn, 2 Curt. C. C. 465, Fed. Cas. No. 3416; Blood v. Martin, 21 Ga. 127; Williams v. Lewis, 115 Ind. 45, 17 N. E. 262, 7 Am. St. 403; Hubbard v. Curtis, 8 Iowa 1, 74 Am. Dec. 283; Crooker v. Crooker, 46 Maine 250; Harney v. First Nat. Bank, 52 N. J. Eq. 697, 29 Atl. 221; Turner v. Smith, 1 Abb. Pr. (N. S.) (N. Y.) 304; Read v. McLanahan, 15 Jones & Spenc. (N. Y.) 275; Place v. Seweetzer, 16 Ohio 142; Rogers v. Nichols. 20 Tex. 719; Washburn v. Bank, 19 Vt. 278.

[32] Crane v. Morrison, 4 Sawy. (U. S.) 138, Fed. Cas. No. 3355; Moore v. Sample, 3 Ala. 319; Jones v. Thompson, 12 Cal. 191; Newhall v. Buckingham, 14 Ill. 405; Williams v. Lewis, 115 Ind. 45, 17 N. E. 262, 7 Am. St. 403; White v. Woodward, 8 B. Mon. (Ky.) 484; Thompson v. Lewis, 34 Maine 167; Sanders v. Young, 31 Miss. 111; Dow v. Sayward, 14 N. H. 9; Phillips v. Cook, 24 Wend. (N. Y.) 389; Sutcliffe v. Dohrman, 18 Ohio 181, 51 Am. Dec. 450; Nixon v. Nash, 12 Ohio St. 647, 80 Am. Dec. 390; Clark v. Lyman, 8 Vt. 290.

[33] Peck v. Schultze, Holmes (U. S.) 28; Daniel v. Owens, 70 Ala. 297; Jones v. Thompson, 12 Cal. 191; Brewster v. Hammet, 4 Conn. 540; Hardy v. Donellan. 33 Ind. 501; Stout v. Fortner, 7 Iowa 183; Chappell v. Cox, 18 Md. 513; Wickham v. Davis, 24 Minn. 167; Sitler v. Walker, Freem. Ch. (Miss.) 77; Mittnight v. Smith, 17 N. J. Eq. 259, 88 Am. Dec. 233; Young v. Frier, 9 N. J. Eq. 465; Moody v. Payne, 2 Johns. Ch. (N. Y.) 548; Saunders v.

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enjoin the levy of such execution, even if it would result in suspending the business.[84]

§ 830. Levy on partnership property for individual debt of a partner.—A judgment against a partner on his individual debt is enforcible against firm property only to the extent of his interest,[85] and a subsequent levy of an execution on a firm debt

Irwin, 17 Hun (N. Y.) 342; Mowbray v. Lawrence, 22 How. Pr. 107, 13 Abb. Pr. (N. Y.) 317; Ketchum v. Durkee, 1 Barb. Ch. (N. Y.) 480, 45 Am. Dec. 412; Smyth v. Barbee, 9 Lea (Tenn.) 173; Lamoille Valley R. Co. v. Bixby, 55 Vt. 235; Bowman v. McGregor, 6 Wash. 118, 32 Pac. 1059.

[84] J. M. Radford Grocery Co. v. Owens (Tex. Civ. App.), 161 S. W. 911.

[85] United States v. Williams, 4 McLean (U. S.) 236, Fed. Cas. No. 16719; Taylor v. Bemis, 4 Biss. (U. S.) 406, Fed. Cas. No. 13779; Andrews v. Keith, 34 Ala. 722; Moore v. Sample, 3 Ala. 319; Jones v. Fletcher, 42 Ark. 422; Robinson v. Tevis, 38 Cal. 611; Jones v. Thompson, 12 Cal. 191; Filley v. Phelps, 18 Conn. 294; Poswa v. Jones, 21 Cal. App. 664, 132 Pac. 629; Weber v. Hertz, 188 Ill. 68, 58 N. E. 676; Swan v. Gilbert, 175 Ill. 204, 51 N. E. 604, 67 Am. St. 208; James v. Stratton, 32 Ill. 202; Newhall v. Buckingham, 14 Ill. 405; Hardy v. Donellan, 33 Ind. 501; Shaw v. Roberts, 144 Iowa 215, 122 N. W. 932; Choppin v. Wilson, 27 La. Ann. 444; Beauchamp v. Chacheré, 12 La. Ann. 851; Smith v. McMicken, 3 La. Ann. 319; Croft v. McKneely, 1 La. Ann. 101; Cucullu v. Manzenal, 4 Mart. (N. S.) (La.) 183; Moore v. Pennell, 52 Maine 162, 83 Am. Dec. 500; Thompson v. Lewis, 34 Maine 167; Peck v. Fisher, 7 Cush. (Mass.) 386; Fisk v. Herrick, 6 Mass. 271; Sitler v. Walker, Freem. Ch. (Miss.) 77; Richards v. Leveille, 44 Nebr. 38, 62 N. W. 304; Dow v. Sayward, 14 N. H. 9; Morrison v. Blodgett, 8 N. H. 238, 29 Am. Dec. 653; Gibson v. Stevens., 7 N. H. 352; Clements v. Jessup, 36 N. J. Eq. 569; Mowbray v. Lawrence, 22 How. Pr. (N. Y.) 107, 13 Abb. Pr. 317; Waddell v. Cook, 2 Hill (N. Y.) 47, 37 Am. Dec. 372; Sutcliffe v. Dohrman, 18 Ohio 181, 51 Am. Dec. 450; Nixon v. Nash, 12 Ohio St. 647, 80 Am. Dec. 390; Knerr v. Hoffman, 65 Pa. St. 126; Lothrop v. Wightman, 41 Pa. St. 297; Bank v. Allen, 1 Del. County (Pa.) 277; Bogue v. Steel, 7 Leg. Int. (Pa.) 162, 1 Phila. 90; Knox v. Schepler, 2 Hill (S. Car.) 595; Jones v. Richardson, 99 Tenn. 614, 42 S. W. 440; Haskins v. Everett, 4 Sneed (Tenn.) 531; Weaver v. Ashcroft, 50 Tex. 427; Russ v. Fay, 29 Vt. 381; Graden v. Turner, 15 Wash. 136, 45 Pac. 733; Bumgarner v. First Nat. Bank (W. Va.), 74 S. E. 996; Holmes v. Mentze, 4 A. & E. 127, 5 N. & M. 563, 4 D. P. C. 300, 1 H. & N. 608, 5 L. J. K. B. 62; Dutton v. Morrison, 17 Ves. Jr. 193, 1 Rose 213, 11 Rev. Rep. 56; Rennie v. Quebec Bank, 3 Ont. L. Rep. 541; Smith v. Thiesen, 20 Manitoba 120. See generally note 57 Am. St. 436; note 46 L. R. A. 481.

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takes precedence over it.[36] It was said in a leading case[37] as to the partner's interest: "It would be superfluous labor to trace the history of the changes which have, from time to time, taken place in the views of the courts respecting the nature of the interests of individual partners in the common stock of a firm, and the respective rights of separate and joint creditors; but it is sufficient to observe that they have resulted in a general recognition of the doctrine, that as between a firm and its creditors the property is vested in the firm, and that no individual partner has an exclusive right to any part of the joint-stock until the firm debts are paid and a balance of account is struck between him and his copartners, and the amount of his interest accurately ascertained. The corpus of the effects is joint property, and neither partner separately has anything in that corpus; but the interest of each is only his share of what remains after the partnership debts are paid and accounts are taken.[38] Partnership effects can not be taken by attachment or sold on execution to satisfy a creditor of one of the partners except to the extent of the interest of such separate partner in the effects, subject to the payment of the firm debts and settlement of all accounts.[39] Purchasers of the share of an individual partner can only take his interest. That interest, and not a share of the partnership effects, is sold, and it consists merely of the share of the surplus which shall remain after the

[36] Hubbard v. Curtis, 8 Iowa 1, 74 Am. Dec. 283; Thompson v. Frist, 15 Md. 24; Barrett v. McKenzie, 24 Minn. 20; Lester v. Givens, 74 Mo. App. 395; Tappan v. Blaisdell, 5 N. H. 190; Harney v. Jersey City First Nat. Bank, 52 N. J. Eq. 697, 29 Atl. 221; Saunders v. Reilly, 105 N. Y. 12, 12 N. E. 170, 59 Am. Rep. 472; New York Eighth Nat. Bank v. Fitch, 49 N. Y. 539; Dunham v. Murdock, 2 Wend. (N. Y.) 553; Wilson v. Conine, 2 Johns. (N. Y.) 280; Coover's Appeal, 29 Pa. St. 9, 70 Am. Dec. 149; Davis v. Hyman (1903), 1 K. B. 854.

[37] Menagh v. Whitwell, 52 N. Y. 146, 11 Am. Rep. 683.

[38] Citing Witter v. Richards, 10 Conn. 37; Pierce v. Jackson, 6 Mass. 243; Crane v. French, 1 Wend. (N. Y.) 311; Doner v. Stauffer, 1 Pa. St. 198; West v. Skip, 1 Ves. Sr. 239; Fox v. Hanbury, Cowp. 445; Taylor v. Fields, 4 Ves. 396, 15 Ves. 559, note; Collyer Partnership, 3rd Am. ed. (Perkins), notes to § 822, pp. 704 to 710; Story Partnership, notes to §§ 261, 262, 263; 2 Kent's Com. (11th ed.) 78, note.

[39] Citing 3 Kent's Com. (11th ed.) 76.

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payment of the debts and settlement of the accounts of the firm.[40] No more property can be carried out of the firm by the assignee of one partner than the partner himself could extract after all the accounts are taken.[41] No person deriving under a partner can be in a better condition than the partner himself.[42] A partner has no right, by an assignment of his interest, to take from the creditors or other partners the right to have their claims against the partnership satisfied out of its property. A mortgage made by one partner, of his undivided interest, can not avail against the creditors of the partnership who attach the partnership property."[43] "Each partner has a legal interest and right of possession as to all the joint assets, and it would be strange, indeed, and contrary to public policy, if such an interest could not be seized and subjected to the payment of any judgment against him. To hold otherwise would place it in the power of an unscrupulous debtor, by entering into such relations to screen his property, or to so hedge the approaches to it, as to render it almost, if not altogether, inaccessible to his creditor. This, justice and sound policy will not permit, and accordingly we find it universally admitted that the interest of a partner in the tangible property of a firm is liable to seizure upon execution, in favor of his separate creditor."[44]

§ 831. Procedure in sale of partner's interest for one partner's debt.—The court said in the opinion in an early case,[45]

[40] Citing 3 Kent's Com. (11th ed.) 78, note b.

[41] Citing West v. Skip, 1 Ves. Sr. 241 (Am. ed.), note; Young v. Keighly, 15 Ves. 557.

[42] Citing Fox v. Hanbury, Cowp. 445.

[43] Citing Lovejoy v. Bowers, 11 N. H. 404.

[44] Nixon v. Nash, 12 Ohio St. 647, 80 Am. Dec. 390. See also Moore v. Sample, 3 Ala. 319; Church v. Knox, 2 Conn. 514; Newhall v. Buckingham, 14 Ill. 405; Burgess v. Atkins, 5 Blackf. (Ind.) 337; White v. Woodward, 8 B. Mon. (Ky.) 484; Phillips v. Cook, 24 Wend. (N. Y.) 389; Walsh v. Adams, 3 Denio (N. Y.) 125; Scrugham v. Carter, 12 Wend. (N. Y.) 131; Place v. Sweetzer, 16 Ohio 142; Knox v. Summers, 4 Yeates (Pa.) 477; Deal v. Bogue, 20 Pa. St. 228, 57 Am. Dec. 702; Whitney v. Ladd, 10 Vt. 165; Mayhew v. Herrick, 7 Com. B. 229; 18 L. J. C. P. 179, 13 Jur. 1078; Collyer Partnership, §§ 822 et seq.; Story Partnership, §§ 261 et seq.; 1 Parsons Contracts, §§ 176 et seq.

[45] Morrison v. Blodgett, 8 N. H. 238, 29 Am. Dec. 653.

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"Mr. Justice Story, in his Commentaries on Equity Jurisprudence, says: 'It is well known that at law an execution for the separate debt of one of the partners may be levied upon the joint property of the partnership. In such a case, however, the judgment creditor can levy, not the moiety, or undivided share of the debtor in the property, as if there were no debts of the partnership, or lien on the same for the balance due to the other partner; but he can levy the interest only of the judgment debtor, if any, in the property, after the payment of all debts and other charges thereon. In short, he can take only the same interest in the property which the judgment debtor would have upon the final settlement of all accounts of the partnership. When, therefore, the sheriff seizes such property upon an execution, he seizes only such undivided and unascertained interest; and if he sells under the execution, the sale conveys nothing more to the vendee, who thereby becomes a tenant in common, substituted to the rights and interest of the judgment debtor in the property seized. In truth, the sale does not transfer any part of the joint property to the vendee, so as to entitle him to take it from the other partners; for that would be to place him in a better situation than the partner himself. But it gives him properly a right in equity to call for an account; and thus to entitle him to the interest of the partner in the property which shall upon such settlement be ascertained to exist.' "[46] This seems to be a necessary result, from the adoption of the principle before stated. It has been repeatedly said that the creditor can have no greater right than the debtor had; and if "he can take only the same interest in the property which the judgment debtor would have upon the final settlement of all the accounts of the partnership," such interest is not an undivided interest in any particular portion of the partnership property, to be reduced into possession to the exclusion of

[46] 1 Story Commentaries on Equity Jurisprudence, 626; Gow Partnership (246), 271; Dutton v. Morrison, 17 Ves. 193, 1 Rose, 213, 11 Rev. Rep. 56; Waters v. Taylor, 2 Ves. & Bea. 299, 15 Ves. 10, 13 Rev. Rep. 91. See also Church v. Knox, 2 Conn. 514; Commercial Bank v. Wilkins, 2 Greenl. (Maine) 28; Gibson v. Stevens, 7 N. H. 352; Scrugham v. Carter, 12 Wend. (N. H.) 131; Crane v. French, 1 Wend. (N. Y.) 311.

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the other partners, or sold to others.[47] One partner has no right to convert the partnership goods to his own purposes[48] although there may be objections to sustaining an action at law if he does so.[49] The officer levying such execution has no right to offer for sale more than the partner's interest in firm property, that is, his share after firm debts are paid and partnership accounts settled. And an officer may be liable in trespass if he offers to sell the whole property on such execution.[50] As said in one case:[51] "It can not be doubted that the interest of one partner, in the goods or property of the firm, may be levied upon and sold on execution for his individual debt. As incidental to the right of sale, the officer may, without interfering with the rights of the other partners, take possession of the entire interest seized, and, on sale, deliver it to the purchaser, who takes subject to the rights of the other partners. The power of the sheriff to take possession of the entire partnership property is merely incidental to the right to reach the interest of the debtor. The sheriff, under some circumstances at least, may, for his own security and in order to protect his levy temporarily pending the sale, take possession of the entire property of the partnership, and after the sale of the debtor's interest so levied upon, redeliver the whole of the property, in which he has sold the interest of the execution defendant, to the other partners and the purchaser.[52]

[47] Young v. Keighly, 15 Ves. 557.

[48] Dob v. Halsey, 16 Johns. (N. Y.) 34, 8 Am. Dec. 293; Livingston v. Roosevelt, 4 Johns. (N. Y.) 251, 4 Am. Dec. 273; Gram v. Cadwell, 5 Cow. (N. Y.) 489; Shirreff v. Wilks, 1 East 48, 5 Rev. Rep. 509.

[49] Jones v. Yates, 9 Barn. & Cress. 532, 4 M. & Ry. 613, 7 L. J. (O. S.) K. B. 217.

[50] Daniels v. Owen, 70 Ala. 297; Jolley v. Hardeman, 111 Ga. 749, 36 S. E. 952; Williams v. Lewis, 115 Ind. 45, 17 N. E. 262, 7 Am. St. 403; Ferguson v. Day, 6 Ind. App. 138, 33 N. E. 213; Spalding v. Black, 22 Kans. 55; Moore v. Pennell, 52 Maine 162, 83 Am. Dec. 500; Walsh v. Adams, 3 Denio (N. Y.) 125; Michalover v. Moses, 19 App. Div. 343, 46 N. Y. S. 456; Zoller v. Grant, 3 N. Y. S. 539, 19 N. Y. St. 311, 24 Jones & S. 279; Deal v. Bogue, 20 Pa. St. 228, 57 Am. Dec. 702; Bogue v. Steel, 7 Leg. Int. (Pa.) 162, 1 Phila. 90; Randall v. Johnson, 13 R. I. 338; Fraser v. Kershaw, 2 Jur. (N. S.) 880, 4 W. R. 431, 25 L. J. Ch. 445, 2 Kay & J. 496.

[51] Ferguson v. Day, 6 Ind. App. 138, 33 N. E. 213.

[52] Citing Williams v. Lewis, 115 Ind. 45, 17 N. E. 262, 7 Am. St. 403; Branch v. Wiseman, 51 Ind. 1; Moore v.

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The sheriff can not, in such case, on execution, against one partner only, seize and levy upon specific articles of partnership property. The levy and sale must be on the interest of the debtor in the partnership property. This follows of necessity because the partners have no separate title in any part of the partnership property.[53] The sheriff must act in obedience to the law, or he becomes a trespasser ab initio. It is not enough to show a judgment and execution in justification, for it must also be shown that he proceeded in the manner provided by law.[54] * * * The facts presented in this case not only show that the whole of the property specifically described in the complaint, belonging to the partnership, was levied upon and seized by the sheriff for the individual debt of one of the partners, but, in addition thereto, it appears from the conclusion and judgment of the court below that the entire value of the whole partnership property so taken by the sheriff was adjudged to belong to appellee, as such sheriff, and he was given judgment therefor in the sum of six thousand dollars. The only right of the sheriff in such case, on a proper levy on the interest of the debtor, is merely incidental to reaching the interest of the execution defendant, in the partnership property seized by him pursuant to such levy. The interest of the partner is subject to the rights of the other partners, and also to the contingency that an accounting may show that such execution defendant has no beneficial or valuable interest. If, in such cases, no steps are taken by any of the parties in interest to invoke the equity powers of the court to adjust the partnership business and to determine the beneficial interest of the debtor in the partnership property, the sheriff may proceed to sell the apparent interest of the execution defendant in the goods and chattels levied on. In no event, however, can the whole property of

Pennell, 52 Maine 162, 83 Am. Dec. 500, and authorities cited in note; Atkins v. Saxton, 77 N. Y. 195; Nixon v. Nash, 12 Ohio St. 647, 80 Am. Dec. 390, and authorities cited in note.

[53] Citing Williams v. Lewis, 115 Ind. 45, 17 N. E. 262, 7 Am. St. 403; Donellan v. Hardy, 57 Ind. 393; Gillham v. Kerone, 45 Mo. 487; Whigham's Appeal, 63 Pa. St. 194.

[54] Citing Rutherford v. Davis, 95 Ind. 245; Jarratt v. Gwathney, 5 Blackf. (Ind.) 237.

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the partnership be sold by the sheriff on execution against one member and the entire proceeds thereof applied to the payment of his individual debt, in utter disregard of the interests of the partnership and the rights of the other members. In such a case—if the levy is duly made on the interest of the execution defendant, the property seized 'without interfering with the rights of the other partners,' except the annoyance necessarily incident to such procedure, and the proceedings are rightfully conducted by the sheriff, in all respects, in the manner calculated to reach the interest of the debtor only. in the partnership property—the sheriff may ordinarily under such circumstances, pending the sale or pursuant to an order of court, temporarily retain the possession of the entire property; but should the sale by him of the interest of the debtor in the property be prevented, or the property be taken from him, all that the sheriff or the execution plaintiff would, in any event, be entitled to recover or receive against or from the parties taking the same, would be the value at the time of the levy, of the beneficial interest of the execution defendant in such property on accounting and settlement of the partnership business."[55] Some cases hold that the officer has no right to levy on specific firm property for a debt of a member of the firm, and if he does so is guilty of an illegal conversion.[56] Others allow a levy on and sale of a portion of the partnership property for an individual partner's debt,[57] while others hold he must levy on the partner's entire interest.[58] Some courts hold

[55] Citing Donellan v. Hardy, 57 Ind. 393.

[56] Blumenfeld v. Seward, 71 Miss. 342, 14 So. 442; Skavdale v. Moyer, 21 Wash. 10, 56 Pac. 841, 46 L. R. A. 481. See also Gerard v. Bates, 124 Ill. 150, 16 N. E. 258, 7 Am. St. 350; Williams v. Lewis, 115 Ind. 45, 17 N. E. 262, 7 Am. St. 403; Levy v. Cowan, 27 La. Ann. 556; Sanborn v. Royce, 132 Mass. 594.

[57] Hershfield v. Claflin, 25 Kans. 166, 37 Am. Rep. 237; Fogg v. Lawry, 68 Maine 78, 28 Am. Rep. 19; Wiles v. Maddox, 26 Mo. 77; Walsh v. Adams, 3 Denio (N. Y.) 125; Phillips v. Cook, 24 Wend. (N. Y.) 389; Randall v. Johnson, 13 R. I. 338; Haskins v. Everett, 4 Sneed (Tenn.) 531.

[58] Tait v. Murphy, 80 Ala. 440, 2 So. 317; Daniel v. Owens, 70 Ala. 297; Weber v. Hertz, 188 Ill. 68, 58 N. E. 676; Swan v. Gilbert, 67 Ill. App. 236; Levy v. Cowan, 27 La. Ann. 556; Pittman v. Robicheau, 14 La. Ann. 108; Alexander v. Burns, 6 La. Ann. 704; Ernest v. Wood-

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he may levy only on such part of the partner's interest as is necessary to satisfy the execution, or is within his reach.[59] In levying on firm property on execution on a judgment against one partner, ordinarily the officer takes possession of the firm property.[60] It was said in one case:[61] "The share of one of several copartners in the goods of the firm may be attached and sold on execution for his individual debt; and as incidental to this right, the officer may take possession of the goods seized, and deliver the whole to the purchaser. But if he sells the entire property in the goods, it is such an abuse of his legal authority as will make him liable as a trespasser ab initio; and an action may be maintained against him in the name of all the members of the firm. With respect to such members of the firm as are not parties to the execution, he is a trespasser, because he has sold their share of the property to pay the debt of others, without any precept or authority in law authorizing him so to do; and with respect to the debtors themselves, because he has sold their shares jointly with the shares of others, and thereby rendered it impossible to determine what proportion of the purchase-money belongs to them, and how much of it ought to be indorsed on the execution, and because it is their right to have their shares sold separately, to the end that they may not only know the precise amount for which they are sold, but because the sale of a larger amount of property in bulk may injuriously affect the price by limiting the number of bidders. Many per-

worth, 124 Mich. 1, 82 N. W. 661; Hutchinson v. Dubois, 45 Mich. 143, 7 N. W. 714; Sirrine v. Briggs, 31 Mich. 443; Blumenfeld v. Seward, 71 Miss. 342, 14 So. 442; Atwood v. Meredith, 37 Miss. 635.

[59] Phillips v. Cook, 24 Wend. (N. Y.) 389; Acher v. Burrall, 23 Wend. (N. Y.) 606, 35 Am. Dec. 582.

[60] United States v. Williams, 4 McLean (U. S.) 236, Fed. Cas. No. 16719; Andrews v. Keith, 34 Ala. 722; Harris v. Phillips, 49 Ark. 58, 4 S. W. 196; Clark v. Cushing, 52 Cal. 617; Davis v. White, 1 Houst. (Del.) 228; White v. Jones, 38 Ill. 159; Newhall v. Buckingham, 14 Ill. 405; Broadnax v. Thomason, 1 La. Ann. 382; Wickham v. Davis, 24 Minn. 167; Barrett v. McKenzie, 24 Minn. 20; Lester v. Givens, 74 Mo. App. 395; Carillon v. Thomas, 6 Mo. App. 574; Read v. McLanahan, 47 N. Y. Super. Ct. 275; Cogswell v. Wilson, 17 Ore. 31, 21 Pac. 388.

[61] Moore v. Pennell, 52 Maine 162, 83 Am. Dec. 500.

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sons might have the ability and be willing to purchase the debtor's share, when they could not purchase a larger amount. Ordinarily, we should not expect the price of the debtor's share to be injuriously affected by selling the entire property; but it is sufficient to protect him against such a sale, to know that such might be the result; that cases might occur in which such a sale would cause his share to sell for less than if it were sold separately. Many other reasons suggest themselves why the law ought not to sanction such a proceeding, but those already named are deemed sufficient to condemn it. Such a sale being illegal, and rendering the officer a trespasser ab initio, the action may properly be brought in the name of all the partners, and they will be entitled to recover the full value of the goods sold, leaving the judgment, to satisfy which the property was sold, in no part satisfied." In some states the manner of such levy is governed by statute.[62]

§ 832. Interest taken by purchaser upon sale of partnership property for individual partner's debt.—The purchaser at an execution sale of one partner's interest in the firm assets to satisfy his individual debt, takes nothing if the firm is insolvent.[63] "It is, no doubt, a well-established principle of law, that partnership stock and property consisting of personal estate, must first be applied to the payment of partnership debts, and there-

[62] Nussbaum v. Connor, 94 Ga. 530, 21 S. E. 709; Waxelbaum v. Connor, 94 Ga. 529, 19 S. E. 805; Aultman v. Fuller, 53 Iowa 60, 4 N. W. 809; Richards v. Haines, 30 Iowa 574; Aldrich v. Wallace, 8 Dana (Ky.) 287, 33 Am. Dec. 495; Crane v. Cranitch, 3 Misc. (N. Y.) 557, 52 N. Y. St. 515, 23 N. Y. S. 320; Dengler's Appeal, 125 Pa. St. 12, 17 Atl. 184; Adoue v. Wettermark, 36 Tex. Civ. App. 585, 82 S. W. 797; Radford Grocery Co. v. Owens (Tex. Civ. App.), 161 S. W. 911; Brown v. Hutchinson, 2 Q. B. 126.

[63] United States v. Williams, 14 McLean (U. S.) 236, Fed. Cas. No. 16719; Rainey v. Nance, 54 Ill. 29; Chandler v. Lincoln, 52 Ill. 74; Peck v. Fisher, 7 Cush. (Mass.) 386; Lane v. Lanfest, 40 Minn. 375, 42 N. W. 84; Williams v. Gage, 49 Miss. 777; Wiles v. Maddox, 26 Mo. 77; Atwood v. Impson, 20 N. J. Eq. 150; Staats v. Bristow, 73 N. Y. 264; Martin v. Wagener, 1 Thomps. & C. (N. Y.) 509; Willett v. Stringer, 17 Abb. Pr. (N. Y.) 152; Walsh v. Adams, 3 Den. (N. Y.) 125; Latham v. Simmons, 48 N. Car. 27; Price v. Hunt, 33 N. Car. 42; Foster v. Barnes, 81 Pa. St. 377; Rundall

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fore that an attachment of such partnership property for a partnership debt, though subsequent in time, will take precedence of a prior attachment of the same property for the debt of one of the partners; it being considered that the real and actual interest of each partner in such partnership stock is the net balance, which will be coming to him after payment of all the partnership debts and a just settlement of the account between himself and his partner."[64] Such purchaser has the right to an accounting,[65] or bill in equity,[66] in order to ascertain the extent of his purchase. In a case where there was a levy on the property of a joint stock company for the debt of one stockholder, the court said:[67] "We do not deny but that the execution may be levied on the joint property, with a view of reaching the undivided interest of the judgment debtors, but in such case the levy is not upon his individual share, as if there were no debts of the partnership, of lien upon the same for the balance due to the other partners. It is upon the interest only of the judgment debtor, if any in the property after the payment of all the partnership debts and other charges thereon. The purchaser takes the same interest in the property which the judgment debtor would have upon a final adjustment of all the accounts of the partnership. It is not only an undivided, but an unascertained interest, and

v. Stedge, 2 Pa. Co. Ct. 608; Bogue v. Steel, 7 Leg. Int. (Pa.) 162, 1 Phila. 90; Boro v. Harris, 13 Lea (Tenn.) 36; Haskins v. Everett, 4 Sneed (Tenn.) 531; Carter v. Roland, 53 Tex. 540; McCutchon v. Davis (Tex.), 8 S. W. 123; Lewis v. Alexander (Tex. Civ. App.), 31 S. W. 414; Perrens v. Johnson, 3 Jur. (N. S.) 975, 3 Smale & G. 419, 65 Eng. Reprint 720.

[64] Peck v. Fisher, 7 Cush. (Mass.) 386.

[65] Claggett v. Kilbourne, 1 Black (U. S.) 346, 17 L. ed. 213; Barrett v. McKenzie, 24 Minn. 20; Day v. McQuillan, 13 Minn. 205; Sterrett v. Buffalo Third Nat. Bank, 10 N. Y. St. 818; Phillips v. Cook, 24 Wend. (N. Y.) 389; Cogswell v. Wilson, 17 Ore. 31, 21 Pac. 288; Lothrop v. Wightman, 41 Pa. St. 297; Gregory's Appeal, 4 Pennyp. (Pa.) 221; Knight v. Ogden, 2 Tenn. Ch. 473; Johnson v. Wingfield (Tenn. Ch. App.), 42 S. W. 203.

[66] Ticonic Bank v. Harvey, 16 Iowa 141; Arnold v. Hagerman, 45 N. J. Eq. 186, 17 Atl. 93, 14 Am. St. 712; Hubble v. Perrin, 3 Ohio 287; Cogswell v. Wilson, 17 Ore. 31, 21 Pac. 388; Sterling v. Brightbill, 5 Watts (Pa.) 229, 30 Am. Dec. 304.

[67] Claggett v. Kilbourne, 1 Black (U. S.) 346, 17 L. ed. 213.

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the purchaser is substituted to the rights and interests of the judgment debtor in the property sold. Neither does the sale transfer any part of the joint property to the purchaser, so as to entitle him to take it from the other partners; for that would be to place him in a better situation than the partner (judgment debtor) himself. The remedy of the purchaser is to go into equity and call for an account, and thus entitle himself to the interest of the judgment debtor, if any, after the settlement of the partnership liabilities. The fact that the property in this case consists of real estate, does not change the principles of law governing the ultimate rights and interests concerned. The real property belonging to the partnership is treated in equity as part of the partnership fund, and is disposed of and distributed the same as the personal assets. In this case the legal title is in the trustees, who are bound to account to the stockholders, the cestuis que trust, according to their respective shares, after all debts of the association have been discharged. The equity of the judgment creditor is the interest in the land, after a sufficient portion of it has been disposed of for this purpose." As one court has said:[68] "It is clear, we think, upon principle and upon authority, that the levying creditor, in the case at bar, having acquired a lien by the seizure, in execution, of his debtor's interest in the tangible property of the firm, might properly file his petition against the other partner for an account of the partnership, and the ascertainment of his debtor's interest in the property seized, before a sale upon execution. The rule in Ohio, at least, seems therefore to be, that upon such levy being made, it is the right of the creditor and of the other copartners, should either desire, to invoke the equity powers of the court to adjust the partnership business and to stay proceedings under the execution, till the beneficial interest of the debtor partner in the goods seized has been ascertained. But that if the creditor does not so elect, and no such steps are taken by the other partners, the officer executing the writ must sell the apparent interest of

[68] Nixon v. Nash, 12 Ohio St. 647, 80 Am. Dec. 390.

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the debtor in the chattels levied on, and upon such sale, redeliver the same to the other partners and the purchaser, who will then be owners in common, subject to a lien in favor of the other partners and the joint creditors, upon the interest of the debtor partner in the hands of the purchaser for any balance due upon final adjustment of the partnership account." At an execution sale of the separate property of a partner to satisfy a judgment against the firm the purchaser takes full title to the property sold,[69] subject to prior liens of executions issued on individual debts of partners,[70] unless it is otherwise provided by statute.[71] But such sale of an individual partner's property under an execution against the firm is void if the individual partner was not served with summons and did not appear in the action.[72] It was said by the Illinois Supreme Court:[73] "From these authorities, and on principle, it appears that an officer having executions against an insolvent partnership, and also against individual members of the firm, is required to make application of the proceeds of firm property to the payment of the executions against the firm, even though such executions are junior to those

[69] Blackman v. Moore-Handley Hardware Co., 106 Ala. 458, 17 So. 629; Haralson v. Campbell, 63 Ala. 278; Conroy v. Woods, 13 Cal. 626, 73 Am. Dec. 605; Parler v. Johnson, 81 Ga. 254, 7 S. E. 317; Cleghorn v. Columbus Ins. Bank, 9 Ga. 319; Gordon v. Kennedy, 36 Iowa 167; Metropolis Nat. Bank v. Sprague, 20 N. J. Eq. 13; Randolph v. Daly, 16 N. J. Eq. 313; Commonwealth v. Rogers, Brightly N. P. 450, Clark 252; Mayhew v. Herrick, 7 C. B. 229, 18 L. J., C. P. 179, 13 Jur. 1078. Compare Bowker v. Smith, 48 N. H. 111, 2 Am. Rep. 189.

[70] In re Sandusky, Fed. Cas. No. 12308; Cleghorn v. Columbus Ins. Bank, 9 Ga. 319; Kuhne v. Law, 14 Rich. (S. Car.) 18.

[71] McCoy v. Watson, 51 Ala. 466; Sawyer v. Armstrong, 23 Colo. 287, 47 Pac. 391; Heins v. Tamblyn, 110 Iowa 478, 81 N. W. 698; Jones v. Jones, 13 Iowa 276; Davis v. Buchanan, 12 Iowa 575; Lewinson v. Albuquerque First Nat. Bank, 11 N. Mex. 510; Souls v. Cornell, 15 App. Div. (N. Y.) 161; Kneib v. Graves, 72 Pa. St. 104; Tassey v. Church, 6 Watts & S. (Pa.) 465, 40 Am. Dec. 575; Clark v. Cullen, 9 Q. B. D. 355, 47 L. T. 307; Alabama Rev. Code, § 2538; Colorado Code Civ. Proc., § 235; Iowa Code 1873, § 3102; New Mexico Comp. Laws, § 2943; New York Civ. Proc., §§ 1934, 1935.

[72] First Nat. Bank v. Greig, 43 Fla. 412, 31 So. 239; Clayton v. Roberts, 84 Ga. 149, 10 S. E. 621; Strong v. Hines, 35 Miss. 201.

[73] Swan v. Gilbert, 175 Ill. 204, 51 N. E. 604, 67 Am. St. 208.

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against the individual members of the firm. The officer, acting as agent of a mortgagee having a chattel mortgage for collection against a firm, may, when an execution against an individual member of the firm comes to his hands, apply the same principle without being liable for a false return. It is apparent, therefore, that Cave, the defendant in the execution, had no property subject to the lien of this execution, for the only interest an individual has in firm property is the surplus after the partnership debts are paid and the accounts between the partners adjusted." The creditor in favor of whose execution the sale is made, is entitled to the proceeds.[74] Generally, executions in favor of firm creditors must be satisfied from the proceeds of sale under several executions, some of which were levied by firm creditors and some by individual creditors, before any application can be made to the executions of individual creditors, irrespective of priority in time of judgment or levy.[75] A purchaser under an execution issued on a judgment against all the partners, though not on a firm debt, acquires, it is held, a right to all the firm assets.[76]

§ 833. Levy of execution on firm property for individual debt—Uniform Partnership Act.—The Uniform Partnership Act by providing that a partner's share is not subject to execution or attachment except for a firm debt, and providing for the issuance of a charging order against such share, on application

[74] Thompson v. Frist, 15 Md. 24; Fenton v. Folger, 21 Wend. 676 (N. Y.); Vandike's Appeal, 57 Pa. St. 9. Except where a court of equity is authorized to interfere and marshal assets; Kelly's Appeal, 16 Pa. St. 59; Doner v. Stauffer, 1 Pen. & W. (Pa.) 198, 21 Am. Dec. 370.

[75] Inbusch v. Farwell, 1 Black (U. S.) 566, 17 L. ed. 188; Commercial Bank v. Mitchell, 58 Cal. 42; Louden v. Ball, 93 Ind. 232; Ryder v. Gilbert, 16 Hun (N. Y.) 163; Coover's Appeal, 29 Pa. St. 9, 70 Am. Dec. 149; Cooper's Appeal, 26 Pa. St. 262; Snodgrass' Appeal, 13 Pa. St. 471; Overholt's Appeal, 12 Pa. St. 222, 51 Am. Dec. 598; Crawford v. Baum, 12 Rich. (S. Car.) 75; Blankenship v. Wartelsky (Tex.), 6 S. W. 140.

[76] Rouse v. Wallace, 10 Colo. App. 93, 50 Pac. 366; Davis v. Delaware &c. Canal Co., 109 N. Y. 47, 15 N. E. 873, 4 Am. St. 418; Saunders v. Reilly, 105 N. Y. 12, 12 N. E. 170, 59 Am. Rep. 472. See Poswa v. Jones, 21 Cal. App. 664, 132 Pac. 629.

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to a competent court, has greatly simplified the complex and perplexing rules now in force as to the rights against firm property of an individual creditor of a partner.[77] In this respect it clarifies the rules of partnership law perhaps more than in any other, and the procedure under it will relieve partners, officers, attorneys and courts from many difficult situations which now arise.

§ 834. Actions after a change in membership.—The general rule is that dissolution of a firm does not change the rights and liabilities of the partners as to third persons, and therefore the general rules as to partners as parties to actions apply after dissolution as well as before.[78] As said in one case:[79] "The defendant made a special contract with the plaintiffs as copartners to do work for him. In any suit to enforce this contract or any liability growing out of it, both partners must be joined as plaintiffs. The defendant contracted with them jointly, not with either of them separately. The dissolution of the partnership before the work was completed had no effect on the rights or liability of the defendant. It did not authorize the plaintiffs to sever the contract and sue the defendant separately. They must still sue jointly." The admission of a new member is the dissolution of the firm, and at common law, it was the rule that an action on a claim of the old firm should be brought in the names of the members of the old firm, as if no change had occurred.[80]

[77] See ante § 821.

[78] Regester v. Dodge, 6 Fed. 6, 19 Blatchf. 79, 61 How. Pr. 107; Howell v. Reynolds, 12 Ala. 128; Gooden v. Morrow, 8 Ala. 486; Matthews v. Paine, 47 Ark. 54, 14 S. W. 463; Molen v. Orr, 44 Ark. 486; Thompson v. McDonald, 84 Ga. 5, 10 S. E. 448; Helm v. O'Rourke, 46 La. Ann. 178, 15 So. 400; Gannett v. Cunningham, 34 Maine 56; Hyde v. Moxie Nerve Food Co., 160 Mass. 559, 36 N. E. 585; Page v. Wolcott, 15 Gray (Mass.) 536; Peters v. Davis, 7 Mass. 257; Busfield v. Wheeler, 14 Allen (Mass.) 139; Hayes v. Knox, 41 Mich. 529, 2 N. W. 670; Smith v. Shelden, 35 Mich. 42, 24 Am. Rep. 529; Holmes v. Shands, 26 Miss. 639; Sanders v. Clifford, 72 Mo. App. 548; Wright v. Williamson, 3 N. J. L. 532; Hill v. Packard, 5 Wend. (N. Y.) 375.

[79] Fish v. Gates, 133 Mass. 441.

[80] Crews v. Yowell, 76 S. W. 127, 25 Ky. L. 598; McKnight v. Lowitz, 176 Mich. 452, 142 N. W. 769; Brown v. Haven, 37 Vt. 439; Wood v. Rutland &c. Mut. F. Ins. Co., 31 Vt. 552; Brougham v. Balfour, 3 U. C. C. P. 72.

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The general rule now, however, under statutes permitting an action to be brought in the name of the real party in interest, or by the assignee of a chose in action, is that actions to enforce the claims of a partnership arising before a change in membership may be brought in the names of the new firm, which has acquired the firm assets, or of the continuing partner who has purchased the interest of his copartner,[81] although this rule does not apply in an action to cancel an assignment of a partner's interest.[82] The general rule at common law was that a retiring partner should be made a party to any action in which he would have been a necessary party if he had not retired.[83] In an equitable action against a retiring partner and the members of the new firm, a creditor of the old firm may enforce the payment of his debt.[84] One, any, or all of the partners may be sued after the dissolution of the partnership for a tort which was committed by a servant of the firm in the course of his employment.[85] Any partner may sue after dissolution to collect debts due the firm.[86] After dissolution it is necessary to join all partners in suing for breach of a firm contract and one partner can not sue alone unless he has been substituted as purchaser of the goods sold to the firm under the contract.[87] If he has been so substituted he may sue in his own name making the copartners defendants.[88] If service on one member of the firm would have been sufficient in an action against it before dissolution, it is sufficient afterward.[89] An assignee of a partnership who has, with the

[81] Walker v. Steele, 9 Colo. 388, 12 Pac. 423; Rector v. Duntley Mfg. Co., 189 Ill. App. 562; West v. Citizens' Ins. Co., 27 Ohio St. 1, 22 Am. Rep. 294; Tolhurst v. Associated Portland Cement Manufacturers [1903], A. C. 414, 72 L. J. K. B. 834, 89 L. T. Rep. (N. S.) 196.

[82] Hausling v. Rheinfrank, 103 App. Div. 517, 93 N. Y. S. 121.

[83] Regester v. Dodge, 6 Fed. 6, 19 Blatchf. (U. S.) 79, 61 How. Pr. 107; Shorter v. Hightower, 48 Ala. 526.

[84] Sheppard v. Bridges, 137 Ga. 615, 74 S. E. 245.

[85] Heidenreich v. Bremner, 260 Ill. 439, 103 N. E. 275.

[86] Lord v. Downs, 112 Maine 396, 92 Atl. 327.

[87] Moore v. Leigh-Head (Okla.), 149 Pac. 1129; Dew v. Pearson, 73 Wash. 602, 132 Pac. 412.

[88] Dew v. Pearson, 73 Wash. 602, 132 Pac. 412.

[89] Nathan v. Thomas, 65 Fla. 240, 58 So. 247.

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assent of the other party to an executory contract of the firm, carried it to completion, may sue on the contract as assignee.[90] In enforcing a liability of the old firm, an action may be brought against all the members of such firm, notwithstanding the fact that the debts of the firm have been assumed by some of the members, or by a new firm which has succeeded to the old.[91] A partner who has retired can not escape liability on that ground, but must plead and prove that he has been released from liability to the plaintiff on the obligation in suit.[92] It is the general presumption that those who were partners when an obligation was incurred by a firm are proper parties defendant when action is brought to enforce such obligation.[93] A partner who alleges that he retired from a firm before an obligation was created, has the burden of showing notice of his retirement to the plaintiff who was a customer of the firm.[94] In some jurisdictions a firm creditor who is not a party to a contract of assumption of firm debts by one partner or a new firm, may as a beneficiary of the contract of assumption sue such partner or new firm.[95] The holder of

[90] Milne v. Douglass, 17 Fed. 482, 5 McCrary 401; Degnan v. Nowlin, 5 Indian Ter. 312, 82 S. W. 758; Lejeune v. Vanfrey Planting &c. Co., 123 La. 871, 49 So. 603; Dyas v. Dinkgrave, 15 La. Ann. 502, 77 Am. Dec. 196; Allston v. Contee, 4 Harr. & J. (Md.) 351.

[91] Shorter v. Hightower, 48 Ala. 526; Sheppard v. Bridges, 137 Ga. 615, 74 S. E. 245; Dean v. McFaul, 23 Mo. 76; Gill v. Bickel, 10 Tex. Civ. App. 67, 30 S. W. 919; Ex parte Gould, 4 Deac. & C. 547, 4 L. J. Bankr. 7, 2 Mont. & A. 48.

[92] Hall v. Jones, 56 Ala. 493; Osborn v. Evans, 91 Iowa 13, 58 N. W. 920; Akin v. VanWirt, 124 App. Div. 83, 108 N. Y. S. 327.

[93] Nevens v. Bulger, 93 Maine 502, 45 Atl. 503; Washburn v. Walworth, 133 Mass. 499; Shaw v. McGregory, 105 Mass. 96; Willis Coal &c. Co. v. Furstenfeld, 146 Mo. App. 279, 129 S. W. 1028; Vance v. Blair, 18 Ohio 532, 51 Am. Dec. 467; Furniture Co. v. Wynn (Tex. Civ. App.), 156 S. W. 340; Adams v. Powers, 82 Va. 612; Cox v. Hubbard, 4 C. B. 317, 56 E. C. L. 317.

[94] Uhl v. Bingaman, 78 Ind. 365; Rodgers-Wade Furniture Co. v. Wynn (Tex. Civ. App.), 156 S. W. 340; Thompson v. Harmon (Tex. Civ. App.), 152 S. W. 1161.

[95] Bessemer Sav. Bank v. Rosenbaum Grocery Co., 137 Ala. 530, 34 So. 609; Ringo v. Wing, 49 Ark. 457, 5 S. W. 787; Lehow v. Simonton, 3 Colo. 346; Morris v. Marqueze, 74 Ga. 86; Dunlap v. McNeil, 35 Ind. 316; Doxey v. Service, 30 Ind. App. 174, 65 N. E. 757; Mueller Lumber Co. v. McCaffrey, 141 Iowa 730, 113 N. W. 903; Poole v. Hintrager, 60 Iowa 180, 14 N. W. 223; Gillen v.

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a note given by a member of a new firm in the name of the new firm for a debt of an old firm, who knows this fact, must prove the assumption of the debt by the new firm in order to maintain an action on the obligation against the new firm.[96] It is a question of fact as to whether proper notice of retirement was given;[97] or whether the obligation arose before dissolution;[98] or whether the debts of the old firm were assumed by the new one;[99] or whether one partner had sold to the other his interest in the firm.[1] An incoming partner sued on a debt of the old firm, may defend by showing that he was induced to assume the firm debts of the old firm by fraud, and that the plaintiff was a party to such fraud.[2] Where injunction lies to restrain breach of a contract which was entered into by a partnership, which was dissolved before the contract was completed, and the firm business was continued by one partner, it may be brought against all the partners.[3] In an action against the original members of a partnership and the assignees of their interest, who, with knowledge of the firm's obligations, had assumed those of their assignors, to recover purchase-money because of the firm's breach

Peters, 39 Kans. 489, 18 Pac. 613; Floyd v. Ort, 20 Kans. 162; Taylor v. Wrather, 155 Ky. 25, 159 S. W. 662; Francis v. Smith, 1 Duv. (Ky.) 121; Reynolds v. Lawton, 62 Hun 596, 17 N. Y. S. 432, 43 N. Y. St. 578; Kinney County Land Co. v. Cubbage (Tex. Civ. App.), 155 S. W. 591; McGibbon v. Walsh, 109 Wis. 670, 85 N. W. 409; J. & H. Clasgens Co. v. Silber, 93 Wis. 579, 67 N. W. 20; Thayer v. Goss, 91 Wis. 90, 64 N. W. 312; Hine v. Beddome, 8 U. C. C. P. 381; Stecker v. Ontario Seed Co., 20 Ont. L. 359.

[96] Waters v. Maddox, 7 La. Ann. 644; Scott City Bank v. Sandusky, 51 Mo. App. 398; Schultze v. Huttlinger, 159 App. Div. 476, 144 N. Y. S. 449.

[97] Westinghouse Elec. &c. Co. v. Hubert, 175 Mich. 568, 141 N. W. 600; Union Nat. Bank of Franklinville v. Dean, 154 App. Div. 869, 139 N. Y. S. 835; Rodgers-Wade Furniture Co. v. Wynn (Tex. Civ. App.), 156 S. W. 340; Alaska Banking & Safe Deposit Co. v. Simmons, 67 Wash. 673, 122 Pac. 319.

[98] Union Nat. Bank of Franklinville v. Dean, 154 App. Div. 869, 139 N. Y. S. 835; Commercial Nat. Bank v. Brinton (Utah), 145 Pac. 42.

[99] American Seeding Mach. Co. v. Holzbauer, 117 Minn. 278, 135 N. W. 807.

[1] Gaisell v. Johnston, 68 Wash. 470, 123 Pac. 783.

[2] Morris v. Marqueze, 74 Ga. 86; Taylor v. Wrather, 155 Ky. 25, 159 S. W. 662.

[3] People's Brewing Co. of Trenton v. Levin, 78 N. J. Eq. 583, 81 Atl. 1114.

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of its contracts for the sale of land, it was held that a judgment that the original partners recover over against their assignees amounts which they were required to pay on the judgment was proper.[4] Where a continuing partner in a law firm sued for services rendered during the partnership, the presumption is that the claim belonged to the partnership and in order to recover, the plaintiff should plead and prove an assignment from the firm to him.[5] "When upon a written contract executed by two or more vendors, copartners, for the future sale and delivery of merchandise there is indorsed the undertaking of a stranger to become surety for the vendee named in the contract, an action can not be maintained upon such undertaking by a part of the vendors so named to whom one or more of them had, before acceptance or the time for performance assigned their interest in the contract and in the property which was its subject, thereby causing a dissolution of the copartnership."[6] Where it does not appear that a new firm assumed the debts of an old one, it is not a defense that one of the partners in both firms had used the funds of the new firm to settle an individual debt due the plaintiff by one of the original partners.[7]

§ 835. Action by or against surviving partner.—The general rule is that any action at law to enforce the rights of the partnership after the death of a partner should be brought by the surviving partner or partners as plaintiffs, without joining the deceased partner's representatives or heirs,[8] unless it is pro-

[4] Kinney County Land Co. v. Cubbage (Tex. Civ. App.), 155 S. W. 591.

[5] McKnight v. Lowitz, 176 Mich. 452, 142 N. W. 769.

[6] Black v. Albery, 89 Ohio 240, 106 N. E. 38.

[7] Douglas Naval Stores Co. v. Georgia Fertilizer & Oil Co., 11 Ga. App. 130, 74 S. E. 844.

[8] Pagan v. Sparks, 2 Wash. (C. C.) 325, Fed. Cas. No. 10659; Robinson v. Hintrager, 36 Fed. 752; Evans v. Silvey, 144 Ala. 398, 42 So. 62; Costley v. Wilkerson, 49 Ala. 210; Miller v. Kern County, 137 Cal. 516, 70 Pac. 549; Berson v. Ewing, 84 Cal. 89, 23 Pac. 1112; Louisville & N. R. Co. v. Morse, 143 Ga. 110, 84 S. E. 428; Linn v. Downing, 216 Ill. 64, 74 N. E. 729; Moore v. Terhune, 161 Ill. App. 155; McIntosh v. Zaring, 150 Ind. 301, 49 N. E. 164; Hayes v. Johnson, 56 Ind. App. 238, 105 N. E. 164; McCandless v. Hadden, 9 B. Mon. (Ky.) 186; Matherson v. Wilkinson, 79

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vided otherwise by statute.[9] It was said in one case:[10] "If, therefore, the partnership actually existed between John and Albert, the title to the property belonging to it still remained in the firm, and upon the death of John the title thereto became vested in Albert as the surviving partner. In all matters connected with the partnership he was the proper party to sue and to be sued. If a partner, it became his duty to close up the partnership matters, collect the assets, pay the debts, and then distribute the fund. Until the partnership fund is ready for distribution, the representatives of the deceased partner have no right to interfere, so long as the surviving partner is proceeding in good faith to wind up its affairs."[11] It is said that the survivor should sue as such, and not in his own right.[12] Misjoinder

Maine 159, 8 Atl. 684; Clark v. Howe, 23 Maine 560; Stafford v. Gold, 9 Pick. (Mass.) 533; Peters v. Davis, 7 Mass. 257; Austin v. Walsh, 2 Mass. 401; Walker v. Maxwell, 1 Mass. 104; Whitman v. Boston &c. R. Co., 3 Allen (Mass.) 133; O'Connell v. Schwanaback, 76 Mich. 517, 43 N. W. 599; Cragin v. Gardner, 64 Mich. 399, 31 N. W. 206; Teller v. Wetherell, 9 Mich. 464; Hargadine v. Gibbons, 114 Mo. 561, 21 S. W. 726; Boyd v. Webster, 58 N. H. 336; Clift v. Moses, 112 N. Y. 426, 20 N. E. 392; Daby v. Ericsson, 45 N. Y. 786; Place v. Bleyl, 45 App. Div. 17, 60 N. Y. S. 800; Carrere v. Spofford, 46 How. Pr. (N. Y.) 294; Holmes v. DeCamp, 1 Johns. (N. Y.) 34, 3 Am. Dec. 293; Felton v. Reid, 52 N. Car. 269; Beach v. Hayward, 10 Ohio 455; Hawkins v. Capron, 17 R. I. 679, 24 Atl. 466; Dial v. Agnew, 28 S. Car. 454, 6 S. E. 295; Davis v. Ross (Tenn. Ch. App.), 50 S. W. 650; Watson v. Miller, 55 Tex. 289; Shivel v. Greer (Tex. Civ. App.), 123 S. W. 207; Philadelphia Fire Assoc. v. Laning (Tex. Civ. App.), 31 S. W. 681; Campbell v. Wallace, 3 Tex. App. Civ. Cas., § 433; Hines v. Dean, 1 Tex. App. Civ. Cas., § 690; Richards v. Heather, 1 B. & Ald. 29; Bolckow v. Foster, 25 Grant Ch. (U. C.) 476.

[9] Notrebe v. McKinney, 6 Rob. (La.) 13; McCord v. West Feliciana R. Co., 1 Rob. (La.) 519; Dick v. Dunlap, 1 Rob. (La.) 54; Babcock v. Brashear, 19 La. 404; Connelly v. Cheevers, 16 La. 30; Cutler v. Cochran, 13 La. 482; Hoey v. Twogood, 11 La. 195; Flower v. O'Connor, 7 La. 194; Crozier v. Hodge, 3 La. 357; Norris v. Ogden, 11 Mart. (La.) 455; Lockhart v. Harrell, 6 La. Ann. 530; Latimer v. Newman, 69 Mo. App. 76; Phoenix Ins. Co. v. Carnahan, 63 Ohio 258, 58 N. E. 805.

[10] Van Kleeck v. Hammell, 87 Mich. 599, 24 Am. St. 182.

[11] Bassett v. Miller, 39 Mich. 133; Merritt v. Dickey, 38 Mich. 41; Pfeffer v. Steiner, 27 Mich. 537; Barry v. Briggs, 22 Mich. 201.

[12] Brown v. Allen, 35 Iowa 306.

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of a deceased partner's administrator as a plaintiff has been held to be waived by failure to object.[13] If the partnership articles provide for the deceased partner's executor to take his place in the firm, it has been held that it is proper to bring suit in the name of the surviving partner and the executor on a contract of the old firm.[14] It has also been held that in one action a surviving partner may recover demands due him individually and demands due him as surviving partner.[15] By the weight of authority actions to enforce obligations of a firm, after the death of a partner, must be brought against the surviving partners alone.[16] In some jurisdictions it is allowable to join

[13] Nicklaus v. Dahn, 63 Ind. 87.

[14] Woarms v. Bauer, 26 N. Y. St. 936, 16 Daly 333, 11 N. Y. S. 59.

[15] Blackstone v. Ragan, 125 Ill. App. 546; Murphy v. Cochran, 146 Iowa 443, 123 N. W. 349.

[16] Brigham-Hopkins Co. v. Gross, 107 Fed. 769; Corson v. Berson, 86 Cal. 433, 25 Pac. 7; West Coast Lumber Co. v. Apfield, 86 Cal. 335, 24 Pac. 993; Doty v. Irwin Phillips Co., 15 Colo. App. 96, 61 Pac. 188; Ross v. Everett, 12 Ga. 30; Roosvelt v. McDowell, 1 Ga. 489; Bauer Grocer Co. v. McKee Shoe Co., 87 Ill. App. 434; Horton v. Brown, 45 Ill. App. 171; Black v. Struthers, 11 Iowa 459; Childs v. Hyde, 10 Iowa 294, 77 Am. Dec. 113; Postlewait v. Howes, 3 Iowa 365; Southard v. Lewis, 4 Dana (Ky.) 148; Fennell v. Myers, 76 S. W. 136, 25 Ky. L. 589; McNally v. Kerswell, 37 Maine 550; Harwood v. Jones, 10 Gill & J. (Md.) 404, 32 Am. Dec. 180; Van Kleeck v. McCabe, 87 Mich. 599, 49 N. W. 872, 24 Am. St. 182; Manning v. Williams, 2 Mich. 105; Robertshaw v. Hanway, 52 Miss. 713; Freeman v. Stewart, 41 Miss. 138; Robinson v. Thompson, Sm. & M. Ch. (Miss.) 454; Rusling v. Brodhead, 55 N. J. Eq. 200, 35 Atl. 841; Merrill v. Blanchard, 158 N. Y. 682, 52 N. E. 1125; Richter v. Poppenhausen, 42 N. Y. 373; Voorhis v. Childs, 17 N. Y. 354; Tiffany v. Hess, 67 Misc. 258, 122 N. Y. S. 482; Callanan v. Keeseville, 48 Misc. 476, 95 N. Y. S. 513; Smith v. Ferguson, 33 App. Div. 561, 53 N. Y. S. 1097; Goelet v. McKinstry, 1 Johns. Cas. (N. Y.) 405; McCaskill v. Lancashire, 83 N. Car. 393; White v. Dillinger (Okla.), 151 Pac. 194; Poppleton v. Jones, 42 Ore. 24, 69 Pac. 919; Johnson v. Weller, 54 Pa. Super. Ct. 481; McClaren v. Citizens' Oil &c. Co., 14 Pa. Super. Ct. 167; Brooks v. Brooks, 12 Heisk. (Tenn.) 12; Saunders v. Stallings, 5 Heisk. (Tenn.) 65; Gant v. Reed, 24 Tex. 46, 76 Am. Dec. 94; Lovelady v. Bennett (Tex. Civ. App.), 30 S. W. 1124; Dulaney v. Walshe, 3 Tex. Civ. App. 174, 22 S. W. 131; Brigham-Hopkins Co. v. Gross, 30 Wash. 277, 70 Pac. 480; Brigham-Hopkins Co. v. Gross, 20 Wash. 218, 54 Pac. 1127; Barlow v. Coggan, 1 Wash. Terr. 257; Wilkinson v. Henderson, 2 L. J. Ch. 190, 1 Myl. & K. 582.

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as defendants the representatives of the deceased partner.[17] A partner who is sued jointly with a personal representative of his deceased partner, can not, it has been held, after judgment object to the misjoinder; his remedy was by plea in abatement, or amendment of the record prior to judgment. All parties to a partnership agreement between a surviving partner and representatives of a deceased partner are necessary parties to a suit to set aside the agreement.[18] If an action is pending against a partnership at the time of the death of a partner, it should, it has been held, be continued against the surviving members of the firm.[19] In a Georgia case, where the articles of partnership provided that the surviving partner could wind up partnership affairs, it was held he could sue for tort without joining the personal representative of a deceased partner.[20] Where there were two surviving partners, and the administratrix of a deceased partner sued one of them alleging that he as executor of the deceased partner had been removed as executor because he failed to inventory the deceased partner's interest as a part of the assets of the estate, and that she had been refused information as to the decedent's interest in the firm, and asked an accounting, both surviving partners were necessary parties, since the action was for accounting.[21] Advantage of the fact that a surviving partner has failed to file a bond required by statute can be taken only by plea in abatement in a suit brought by him. The general issue admits the capacity in which he sues.[22] One sued as a surviving partner, who established his defense that he was a stranger to the firm and not liable on firm notes is not liable for the conver-

[17] Anderson v. Pollard, 62 Ga. 46; Garrard v. Dawson, 49 Ga. 434; Indiana Pottery Co. v. Bates, 14 Ind. 8; Marble v. Marble, 4 Ky. L. 360; Johnson v. Weller, 54 Pa. Super. Ct. 481; Trundle v. Edwards. 4 Sneed (Tenn.) 572; Simpson v. Young, 2 Humph. (Tenn.) 514; Carter v. Currie, 5 Call (Va.) 158; Eng. Partnership Act (1890), § 9.

[18] Smith v. Irvin, 108 App. Div. 218, 95 N. Y. S. 731.

[19] Dineen v. Lanning, 92 Nebr. 545, 138 N. W. 759; White & Smith v. Dillinger (Okla.), 151 Pac. 194.

[20] Louisville & N. R. Co. v. Morse, 143 Ga. 110, 84 S. E. 428.

[21] O'Brien v. O'Brien, 16 Cal. App. 193, 116 Pac. 696.

[22] Seruta v. Surace, 111 Maine 508, 90 Atl. 328.

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sion of firm assets after the death of the alleged partner.[23] Persons claiming under a deceased partner are not limited to a recovery of the selling price in an action against a surety of a partnership administrator to recover for a sale of property by the administrator to himself as purchaser.[24] The action of a probate court in ordering that the legatees of a deceased partner could use the name of a copartner, who was appointed the deceased partner's executor, in suing for the decedent's interest in the firm, was held improper, since unnecessary.[25] Judgment against a surviving partner binds the firm assets under his control and may be enforced by execution.[26] A judgment against a surviving partner will ultimately affect the individual assets of the deceased partner, and it is irregular when based on a submission to arbitration which was not binding on the deceased partner.[27] Under the statutes of some jurisdictions, attachment will, under some circumstances, issue against a surviving partner in an action upon a claim against the partnership, and the procedure in such cases follows the particular statute.[28] After the death of a partner the rule at common law is that a judgment in favor of the partnership does not become dormant, but execution may be issued on it by the surviving partner, who has title to all firm property for the purpose of settling its affairs.[29] The contrary, however, is held in Kansas.[30] The representatives of the deceased partner

[23] Letson v. Hall, 1 Ala. App. 619, 55 So. 944.

[24] State v. American Surety Co. of New York (Mo.), 177 S. W. 1074;

[25] In re Sloman's Estate (Mich.), 152 N. W. 959.

[26] Stampfle v. Bush, 71 W. Va. 659, 77 S. E. 283.

[27] Hoffman v. Westlecraft, 85 N. J. L. 484, 89 Atl. 1006.

[28] Filley v. Phelps, 18 Conn. 294; Sheffield v. Key, 14 Ga. 537; Powell v. Hopson, 13 La. Ann. 626; Turner v. Collins, 1 Mart. (N. S.) (La.) 369; Berry v. Harris, 22 Md. 30, 85 Am. Dec. 639; Allis v. Day, 13 Minn. 199; Roach v. Brannon, 57 Miss. 490; State v. Mason, 96 Mo. 127, 9 S. W. 19; Krueger v. Speith, 8 Mont. 482, 20 Pac. 664, 3 L. R. A. 291; Swezey v. Brown, 10 Wkly. Notes Cas. (Pa.) 207.

[29] Linn v. Downing, 216 Ill. 64, 74 N. E. 729; Corder v. Steiner (Tex. Civ. App.), 54 S. W. 277. See also Hargadine v. Gibbons, 114 Mo. 561, 21 S. W. 726; Judy v. St. Louis Ice Mfg. Co., 60 Mo. App. 114; Ellison v. Andrews, 12 Ired. L. (N. Car.) 188; Dikinson v. Bowers, 7 Baxt. 307.

[30] Newhouse v. Heilbrun, 74 Kans.

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have the right in equity to compel the application of partnership property to partnership debts.[31] "Dissolution takes place by the death of a member, and by bankruptcy or insolvency. In cases falling within either of these classes, the affairs of the partnership are frequently wound up, and the effects and estates administered in courts of justice. Courts always have respect to the fiduciary rights and duties which subsist between partners, and in the absence of special circumstances to vary the rule, will apply partnership effects primarily to partnership debts. This because of the trust which subsisted between the parties. Hence if the death of a member cause the dissolution, the representative or succession to his estate has the clear right to have the partnership effects applied to the payment of partnership debts, in preference to the debts of the survivor, and in like preference of any right he may assert to re-embark them in trade; and the insolvency of the deceased member does not vary the question. In the administration and settlement of a firm thus dissolved, the court will enforce the trust in favor of the deceased of bankrupt member's estate, and apply the assets first to the payment of the partnership debts, but not because of any lien or right the creditor or creditors can assert. They have no such lien or right. It is their debtor's right to have the assets thus applied; and enforcing that clear right, the benefit and preference accrue to the partnership creditor. It is thus that the court of equity, by a process of its own, works out the partnership debtor's quasi lien in the prior payment of the partnership creditor's demand, while he himself has no lien, and can assert no claim to be a beneficiary under the trust."[32]

§ 836. Proceedings against estate of deceased partner.—The deceased partner's estate is universally held liable for firm obligations, notwithstanding the general rule that in an action at law the representatives of the deceased partner can not be

282, 86 Pac. 145, 10 Ann. Cas. 955; Ballinger v. Redhead, 1 Kans. App. 434, 40 Pac. 828.

[31] See ch. 20.

[32] Goldsmith v. Eichold, 94 Ala. 116, 33 Am. St. 97.

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joined with the surviving partner.[33] The rule in some states is that a creditor of the firm, before he can proceed against the estate of a deceased partner, must show that he has proceeded against the surviving partners to execution, or that they are insolvent, the reason given for the rule being that the partnership assets, of which the surviving partner has control, are the primary fund from which firm debts should be paid.[34] The rule in New York is: "Where the plaintiff can prove the insolvency of the survivor, and thus show that he has no legal remedy for the collection of his debt against him, he may proceed to enforce payment from the estate of a deceased partner, or other joining debtor, without bringing an action against the survivor, or he may exhaust his legal remedy against the survivor, and then proceed against the estate of the deceased debtor. The representatives of the estate of the deceased debtor have an adequate remedy against the sheriff, in case of a wrongful return of the execution."[35] As the court said in one case:[36] "We do not find, either

[33] Goldsmith v. Eichold, 94 Ala. 116, 10 So. 80, 33 Am. St. 97; Savings &c. Soc. v. Gibb, 21 Cal. 595; Storer v. Hinkley, Kirby (Conn.) 147; Evans v. Superior Steel Co., 114 Ill. App. 505; Sampson v. Shaw, 101 Mass. 145, 3 Am. Rep. 327; Hoffman v. Westlecraft, 85 N. J. L. 484; Morgan v. Skidmore, 3 Abb. N. Cas. (N. Y.) 92; Lang v. Keppele, 1 Binn. (Pa.) 123; Gant v. Reed, 24 Tex. 46, 76 Am. Dec. 94; Sale v. Dishman, 3 Leigh (Va.) 548.

[34] Nelson v. Hill, 5 How. (U. S.) 127, 12 L. ed. 81; Troy Iron &c. Factory v. Winslow, 1 Ban. & A. 98, 11 Blatchf. 513, Fed. Cas. No. 14199; Winfrey v. Clarke, 107 Ala. 355, 18 So. 141; Beaton v. Wade, 14 Colo. 4, 22 Pac. 1093; Leggat v. Leggat, 176 N. Y. 590, 68 N. E. 1119; Hoyt v. Bonnett, 50 N. Y. 538; Richter v. Poppenhausen, 42 N. Y. 373; Tracy v. Suydam, 30 Barb. (N. Y.) 110; Voorhies v. Baxter, 1 Abb. Pr. 43, 18 Barb. (N. Y.) 592; Dubois' Case, 3 Abb. Pr. (N. Y.) 177; Lawrence v. Leake &c. Orphan House, 2 Denio (N. Y.) 577; Hamersley v. Lambert, 2 Johns. Ch. (N. Y.) 508; Slatter v. Carroll, 2 Sandf. Ch. (N. Y.) 573; In re Burdick, 79 Misc. 167, 140 N. Y. S. 582, 4 N. Y. Civ. Proc. R. 21; Norment v. Wittmann, 157 App. Div. 708, 142 N. Y. S. 717; Seligman v. Friedlander, 199 N. Y. 373, 92 N. E. 1047; Burgwin v. Hostler, 1 N. Car. 167, Tayl. 124, 1 Am. Dec. 582; Horsey v. Heath, 5 Ohio 353; Island Sav. Bank v. Galvin, 19 R. I. 569, 36 Atl. 1125; Taylor v. Slater, 17 R. I. 801, 24 Atl. 835; Pearce v. Cooke, 13 R. I. 184; Shaw v. Knowles, 3 R. I. 112; Philson v. Bampfield, 1 Brev. (S. Car.) 202.

[35] Pope v. Cole, 55 N. Y. 124, 14 Am. Rep. 198.

[36] Pearson v. Keedy, 6 B. Mon. (Ky.) 128, 43 Am. Dec. 160.

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in principle or precedents, any authority for the position that the creditor of a firm may, upon the death of one of the partners, go into chancery as a matter of course, to coerce satisfaction of a legal demand, out of the effects of the firm in the hands of the survivor. If the survivor is solvent, the legal remedy against him is plain, and as efficient to reach the effects of the firm in his hands, of whatever description they may be, as the like remedy against any other individual is, to reach his effects of the same species. The survivor is, at law, the only debtor of the firm creditor, and through him the visible effects of the firm in possession of which for the purpose of paying debts, he is entitled to the custody and control, are accessible by legal execution. The debt being his own, his individual property, which had never belonged to the firm, is also accessible in the same manner. There is, therefore, no failure of the legal remedy while either the effects of the firm or those of the survivor, of a species liable to execution, remain in his hands; and as it is immaterial to the creditor whether his debt is satisfied out of the individual effects or out of those which had belonged to the firm, even the conversion of the latter into choses in action, gives him no cause for going into chancery to reach them, while the former remain accessible to his legal remedy. Each partner has unquestionably a right to have the effects of the firm appropriated to the firm debts, and has, in equity at least, a lien upon those effects to secure not only this appropriation, but also any final balance in his own favor. The creditor of the firm has no such lien in himself, but only a derivative equity based upon the rights of the partners themselves. In virtue of which he may, in case of the death of one and the insolvency of the survivor, be substituted to the right of the deceased or his representatives, to have the partnership effects appropriated to the partnership debt. But this right of substitution is based on necessity arising from the insolvency of the survivor and the consequent inefficiency of the legal remedy." But in other states there are concurrent remedies against the estate of the deceased partner and the surviving

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partner, and both may be followed at the same time.[37] The United States Supreme Court has said:[38] "The creditor of a partnership may, at his option, proceed at law against the surviving partner, or go in the first instance, into equity against the representatives of the deceased partner. It is not necessary for him to exhaust his remedy at law against the surviving partner before proceeding in equity against the estate of the deceased. Where there were two mercantile firms and some of the members common to both, a creditor's bill was not multifarious when filed against the personal representatives of two of the deceased partners of the two firms, and also against the surviving partner of one of the firms." It was said in one case:[39] "It is contended that equity is without jurisdiction of the bill, because it is in the nature of a creditor's bill or a bill of discovery, which will not lie until the remedy at law has been exhausted by the procuring of a judgment and execution. The bill is not, however, of that character, but is an original proceeding against the estate of a deceased partner to enforce his liability upon a partnership contract, in which case the estate is primarily liable in equity, which may be resorted to in the first instance."[40] It is not uncommon in equitable proceedings for the court to permit proceedings against the deceased partner's estate, or the joinder of surviving partners

[37] Smith v. Mallory, 24 Ala. 628; McCulloch v. Judd, 20 Ala. 703; Smith v. Van Gilder, 26 Ark. 527; Filley v. Phelps, 18 Conn. 294; Doggett v. Dill, 108 Ill. 560, 48 Am. Rep. 565; Newman v. Gates, 165 Ind. 171, 72 N. E. 638; Vance v. Cowing, 13 Ind. 460; Small v. Davis, 12 Ind. App. 635, 40 N. E. 934; Bass v. Emery, 74 Maine 338; Van Kleeck v. McCabe, 87 Mich. 599, 49 N. W. 872, 24 Am. St. 182; Freeman v. Stewart, 41 Miss. 138; Grosvenor v. Austin, 6 Ohio 103, 25 Am. Dec. 743; Williams v. Bradley, 5 Ohio Cir. Ct. 114, 3 Ohio Cir. Dec. 58; Saunders v. Wilder, 2 Head (Tenn.) 577; Sale v. Dishman, 3 Leigh (Va.) 548; In re Hodgson, 31 Ch. Div. 177, 55 L. J. Ch. 241; Hills v. McRae, 9 Hare 297, 15 Jur. 766, 20 L. J. Ch. 533; Cheetham v. Crook, 1 McClell. & Y. 307; Stephenson v. Chiswell, 3 Ves. 566, 30 Eng. Reprint 1158; Thorpe v. Jackson, 2 Y. & C. 553; Eng. Partnership Act (1890), § 9.

[38] Nelson v. Hill, 5 How. (U. S.) 127, 12 L. ed. 80.

[39] Union Trust Co. v. Shoemaker, 258 Ill. 564, 101 N. E. 1050.

[40] Nelson v. Hill, 5 How. (U. S.) 127, 12 L. ed. 80; Doggett v. Dill, 108 Ill. 560, 48 Am. Rep. 565; Mason v. Tiffany, 45 Ill. 392; Ladd v. Griswold, 4 Gilm. (Ill.) 25, 46 Am. Dec. 443.

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and the deceased partner's representatives, when no such procedure would be allowed at law.[41] As a rule the jurisdiction of actions by the surviving partner or partnership creditors against the estate of a deceased partner is in equity.[42] In some jurisdictions the exclusive cognizance of such actions is placed by statute in the probate courts.[43] A voluntary assignment for benefit of creditors by a surviving partner has been held insufficient to transfer jurisdiction of a partnership estate from the probate court to the circuit court.[44] In proceedings to subject the estate of a deceased partner to claims against the firm, suit should be brought against his personal representatives,[45] and the surviving partners should

[41] Nelson v. Hill, 5 How. (U. S.) 127, 12 L. ed. 81; Vose v. Philbrook, 3 Story (U. S.) 335, Fed. Cas. No. 17010; Waldron v. Simmons, 28 Ala. 629; Raisch v. Warren, 18 Cal. App. 655, 124 Pac. 95; Fillyan v. Laverty, 3 Fla. 72; Scott v. Scott, 33 Ga. 102; Garvin v. Stewart, 59 Ill. 229; Weyer v. Thornburgh, 15 Ind. 124; Indiana Pottery Co. v. Bates, 14 Ind. 8; Pearson v. Keedy, 6 B. Mon. (Ky.) 128, 43 Am. Dec. 160; Bennett v. Bennett, 93 Maine 241, 44 Atl. 894; Citizens' Mut. Ins. Co. v. Ligon, 59 Miss. 305; Hanway v. Robertshaw, 49 Miss. 758; Boisgerard v. Wall, Sm. & M. Ch. (Miss.) 404; Haines v. Hollister, 64 N. Y. 1; Zimmerman v. Kunkel, 43 Hun 638, 6 N. Y. St. 768; Butts v. Gening, 5 Paige (N. Y.) 254; Copcutt v. Merchant, 4 Bradf. Surr. (N. Y.) 18; Drake v. Blount, 17 N. Car. 353; Jackson v. King, 8 Leigh (Va.) 689; Galt v. Calland, 7 Leigh (Va.) 594; Brett v. Beckwith, 3 Jur. (N. S.) 31, 26 L. J. Ch. 130, 5 W. R. 112; Baxter v. Turnbull, 2 Grant Ch. (U. C.) 521.

[42] Raisch v. Warren, 18 Cal. App. 655, 124 Pac. 95; Union Trust Co. v. Shoemaker, 258 Ill. 564, 101 N. E. 1050; Moore Furniture Co. v. Prussing, 71 Ill. App. 666; Hills v. McRae, 9 Hare 297, 20 L. J. Ch. 533, 15 Jur. 66.

[43] Lewis v. Moore, 9 Rob. (La.) 196; Anderson v. Birdsall, 19 La. 441; Caldwell v. Hawkins, 73 Mo. 450. Compare Knox v. Bates, 79 Ga. 425, 5 S. E. 61.

[44] Troll v. St. Louis, 257 Mo. 626, 168 S. W. 167.

[45] Nelson v. Hill, 5 How. (U. S.) 127, 12 L. ed. 81; McLain v. Carson, 4 Ark. 164, 37 Am. Dec. 777; Savings &c. Soc. v. Gibb, 21 Cal. 595; Camp v. Grant, 21 Conn. 41, 54 Am. Dec. 321; Fillyan v. Laverty, 3 Fla. 72; Mason v. Tiffany, 45 Ill. 392; Ralston v. Moore, 105 Ind. 243, 4 N. E. 673; Braxton v. State, 25 Ind. 82; Ransom v. Pomeroy, 5 Blackf. (Ind.) 383; Postlewait v. Howes, 3 Iowa 365; Maxey v. Averill, 2 B. Mon. (Ky.) 107; Manning v. Williams, 2 Mich. 105; Irby v. Graham, 46 Miss. 425; Buckingham v. Ludlum, 37 N. J. Eq. 137; Blair v. Wood, 108 Pa. St. 278; Lang v. Keppele, 1 Binn. (Pa.) 123; Creswell v. Blank, 3 Grant Cas. (Pa.) 320; Sherman v. Kreul, 42 Wis. 33; Wilkinson v. Henderson, 1 Myl. & K. 582, 2 L. J. Ch. 190; Devaynes

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be joined to answer to their interest.[46] The liability for services rendered under a contract with the personal representative of a deceased partner, is not a liability of the firm, which was dissolved by his death. It has been held that a suit against the personal representative for the settlement of a partnership will not be considered prematurely brought unless special reason for so holding is shown.[47] A surviving partner has been held entitled to bring an action against the deceased partner's administrator for an accounting and to restrain the disposal of assets, even though no judgment had been had at law.[48] The widow of a deceased partner suing to recover her share should make the children parties plaintiff or defendant, under the Kentucky code.[49] The statutes vary in the different jurisdictions as to the time when the statute of limitations bars actions by or against surviving partners or representatives of deceased partners.[50] In some jurisdictions a partnership creditor has no right to sue while the partnership estate is being administered in the courts, and the statute of limitations does not run during this time.[51] Some courts

v. Noble, 1 Mer. 580, 15 Rev. Rep. 151.

[46] Vose v. Philbrook, 3 Story (U. S.) 335, Fed. Cas. No. 17010; Watkins v. Adams, 53 Colo. 290, 125 Pac. 122; Fillyan v. Laverty, 3 Fla. 72; Anderson v. Pollard. 62 Ga. 46; Garrard v. Dawson, 49 Ga. 435; Ross v. Everett, 12 Ga. 30; Braxton v. State, 25 Ind. 82; Freeman v. Stewart, 41 Miss. 138; Parish v. Lewis, Freem. (Miss.) 299; Lawrence v. Leake, 2 Denio (N. Y.) 577; Pope v. Cole, 55 N. Y. 124, 14 Am. Rep. 198; Van Riper v. Poppenhausen, 43 N. Y. 68; Stahl v. Stahl, 2 Lans. (N. Y.) 60; Parker v. Jackson, 16 Barb. (N. Y.) 33; Wiesenfeld v. Byrd, 17 S. Car. 106; Saunders v. Wilder, 2 Head (Tenn.) 577; In re Hodgson, 31 Ch. Div. 177.

[47] Williamson v. Succession of Scott, 133 La. 307, 62 So. 935.

[48] Raisch v. Warren, 18 Cal. App. 655, 124 Pac. 95.

[49] Hackett v. State Bank & Trust Co., 155 Ky. 392, 159 S. W. 952.

[50] Brigham-Hopkins Co. v. Gross, 107 Fed. 769; Goldsmith v. Eichold, 94 Ala. 116, 10 So. 80, 33 Am. St. 97; Willis v. Sutton, 116 Ga. 283, 42 S. E. 526; Bennett v. Bennett, 92 Maine 80, 42 Atl. 237; Denny v. Turner, 2 Mo. App. 52; Gibbons v. Bush Co., 115 App. Div. 619, 101 N. Y. S. 721; Cohen v. Hymes, 64 Hun 54, 18 N. Y. S. 571, 45 N. Y. St. 821; Hambough v. Carney (Tenn. Ch.), 62 S. W. 503; Lovett v. Perry, 98 Va. 604, 37 S. E. 33; Brown v. Gordon, 16 Beav. 302, 22 L. J. Ch. 65, 1 W. R. 2; Braithwaite v. Britain, 1 Keen. 206, 15 Eng. Ch. 206; McFadgen v. Stewart, 11 Grant Ch. (U. C.) 272. See ante § 644.

[51] Brigham-Hopkins Co. v. Gross,

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hold that the representatives of a deceased partner can not set up the statute of limitations against a firm creditor so long as the surviving partner is liable and may call on them for contribution,[52] but the contrary has also been held.[53] Under circumstances such that it is necessary to preserve partnership assets, or to secure their honest administration, the court may appoint a receiver in an action by creditors against the surviving partner.[54] Laches, such as delay for fifteen,[55] or thirty-two years,[56] may bar the right of a deceased partner's representatives, or of partnership creditors to have an accounting of the partnership matters, or set aside a sale of land sold in partition on dissolution of the firm, and where the rights of creditors which are superior to rights of heirs of the deceased partner are barred by laches, it has been held that the rights of the heirs are also barred.[57]

§ 837. **Surety on partnership bond.**—On appeal by a partnership an appeal bond signed by one partner has been held sufficient.[58] A surety upon a partnership bond is liable only for a breach of the obligation occurring before the dissolution of the firm, but if the surety has become liable for the performance of a particular contract by a partnership, its subsequent dissolution before the completion of the contract will not release him from liability for each of the former partners so far as that particular contract is concerned.[59] A surety for a partnership is not liable for the acts of a surviving member of the firm after the death

30 Wash. 277, 70 Pac. 480; Brigham-Hopkins Co. v. Gross, 20 Wash. 218, 54 Pac. 1127.

[52] Buckingham v. Ludlum, 37 N. J. Eq. 137; Winter v. Innes, 2 Jur. 981, 4 Myl. & C. 101, 18 Eng. Ch. 101.

[53] Way v. Bassett, 5 Hare 55, 10 Jur. 89, 15 L. J. Ch. 1.

[54] Dick v. Laird, 4 Cranch (C. C.) 667, Fed. Cas. No. 3891; Word v. Word, 90 Ala. 81, 7 So. 412; Moyers v. Cummings, 17 App. (D. C.) 269.

[55] Glock's Admr. v. Weikel, 149 Ky. 170, 147 S. W. 897.

[56] Troll v. St. Louis, 257 Mo. 626, 168 S. W. 167.

[57] Troll v. St. Louis, 257 Mo. 626, 168 S. W. 167.

[58] Tate v. Holly, 21 Colo. App. 451, 122 Pac. 58.

[59] Freeman v. Berkey, 45 Minn. 438, 48 N. W. 194; Kauffmann v. Cooper, 46 Nebr. 644, 65 N. W. 796.

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of one, unless a contrary intention appears on the face of the contract.[60] Where a bond is given by one partner to the others, and one of the others dies, the surety on the bond is not liable for any acts of the principal thereafter.[61] But where the intention, appearing from the instrument, is to be bound to obligees as a class or changing body, a change in the personnel of the body or in the number thereof will not operate as a discharge of the surety.[62] A surety for one person as principal is not liable for the acts of a partnership subsequently formed by that person with another.[63] Where one member of a partnership retires from the firm and the remaining members agree with him to pay the firm debt, and these facts are known to the creditor, the member so retiring will be considered in law a surety.[64]

[60] Simson v. Cooke, 1 Bing. 452, 8 E. C. L. 590; Connecticut Mut. L. Ins. Co. v. Bowler, Holmes (U. S.) 263, Fed. Cas. No. 3106.

[61] Chapman v. Beckington, 3 Q. B. 703, 3 G. & D. 33, 12 L. J. Q. B. 61, 7 Jur. 62; Bodenham v. Purchas, 2 B. & Ald. 32, 20 Rev. Rep. 342. Bowers v. Cobb, 31 Fed. 678, held that where, by an arrangement between two sureties on a bond, one of them is released from liability as between themselves, sureties on an indemnifying bond given to them are discharged.

[62] Metcalf v. Bruin, 2 Campb. 422, 12 East 400; Gargan v. School Dist. No. 15, 4 Colo. 53.

[63] Connecticut Mut. L. Ins. Co. v. Scott, 81 Ky. 540, 5 Ky. L. 639; Parham Sewing Mach. Co. v. Brock, 113 Mass. 194.

[64] Williams v. Boyd, 75 Ind. 286; Wendlandt v. Sohre, 37 Minn. 162, 33 N. W. 700. See ante §§ 556, 558.

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CHAPTER XXVI

PLEADING

SECTION
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865. Summons.
866. Verification.

§ 845. **Generally—Parties.**—The aim of this chapter is to give a brief review of the general rules of pleading in actions by and against partnerships, and between partners. One branch of the subject, that is, who are necessary and proper parties in such actions, has been covered in the chapter on actions.[1]

§ 846. **Caption.**—A caption is not a pleading, but it is held to be a part thereof, in all pleadings, at least as to certain matters. In general, the caption is the same in all pleadings in the same case; in fact, it is provided in some states by statute that the title of the case shall not be changed in the various pleadings, even though parties may be added or dismissed, and essentially the caption is the title to the case. In actions governed by statutes providing for suit by or against partnerships in the firm name

[1] Chapters 24, 25.

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alone, it is sufficient to name the party plaintiff or defendant in such terms, as, for example, if A, B and C are partners doing business under the firm name of A, B & Company it is sufficient to name as plaintiff or defendant, A, B & Company. Where the statutes of a particular state do not thus provide, or the firm does not come within the provisions of the statute, by reason of nonresidence, nonregistration, or any other cause, then the partners should be named, together with the firm name; as, for example, A, B and C, partners doing business as A, B & Company. As a rule, all parties interested should be made parties to the suit, and so included in the caption, except that in states where statutory enactment precludes a change in the caption, only the original parties to the suit will appear in the caption of the various pleadings, however many others may be added. An exception to the rule that all parties interested should be made parties to the suit, and included in the caption, is that where the number of partners is very large, and too numerous to bring upon the record, or[2] in the case of an unincorporated joint stock company, in which frequent changes by death or transfer of shares may occur, one may sue for all, and in such case only the name of the party commencing the suit, need be in the caption as plaintiff.[3] Under the codes, in several states, the caption is made a part of the petition, and in such states, and possibly in some others a repetition of the names of the partners in the petition is not necessary where they are all named in the caption.[4] It is undoubtedly the better and safer rule, however, to allege the fact of partnership in the body of the petition, without relying on the fact of its being included in the caption, inasmuch as this is an allegation which may be controverted, and the caption, as stated above, is the title of the case, and not the place to state issuable facts.[5] The contrary has been held, however, in several states.[7]

[2] See ante § 801.

[3] Platt v. Colvin, 50 Ohio St. 703, 36 N. E. 735.

[4] Pierson v. Fuhrmann, 1 Colo. App. 187, 27 Pac. 1015; Walter v. Godshall, 32 S. Car. 187, 10 S. E. 951.

[5] Foerster v. Kirkpatrick, 2 Minn. 210; Norton v. Thatcher, 8 Nebr. 186.

[7] McCloskey v. Strickland, 7 Iowa 259; King v. Bell, 13 Nebr. 409, 14 N. W. 141.

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§ 847. Petition, complaint, or declaration—Statement of partnership relation.—Inasmuch as the object of pleadings is to place, before the court, in plain, logical and consecutive order, the material and relevant facts governing the issues of the case, it would seem that one of the first allegations should be the averment of the partnership relation between either the plaintiffs or defendants, as the case may be. If partners are suing or being sued jointly, their respective rights or liabilities to sue or be sued jointly must appear, and if the joint right or liability is not otherwise shown, there must be an averment of the partnership. So wherever the right of partners to sue or to join as plaintiffs depends on the fact of partnership, there should be an averment of the fact of partnership, in clear words,[8] and a mere suggestion of partnership as an inference from other facts, is not sufficient.[9] "The averment that plaintiffs were merchants,

[8] Lapeyre v. Gales, 2 Cranch (C. C.) 291, 14 Fed. Cas. No. 8081; Braun v. Woollacott, 129 Cal. 107, 61 Pac. 801; Alpers v. Schammel, 75 Cal. 590, 17 Pac. 708; Wise v. Williams, 72 Cal. 544, 14 Pac. 204; Pfister v. Wade, 69 Cal. 133, 10 Pac. 369; Lucas v. Gobbi, 10 Cal. App. 648, 103 Pac. 157; Fryer v. Breeze, 16 Colo. 323, 26 Pac. 817; Ray v. Pollock, 56 Fla. 530, 47 So. 940; De Graum v. Jones, 23 Fla. 83, 6 So. 925; Whitlock v. Mozley, 142 Ga. 305, 82 S. E. 886; Duckwall v. Jones, 156 Ind. 682, 58 N. E. 1055, 60 N. E. 797; McDonald v. Franchere, 102 Iowa 496, 71 N. W. 427; Wendall v. Osborne, 63 Iowa 99, 18 N. W. 709; Sweet v. Ervin, 54 Iowa 101, 6 N. W. 156; Thorne v. Fox, 67 Md. 67, 8 Atl. 667; Danaher v. Hitchcock, 34 Mich 516; Pegg v. Bidleman, 5 Mich. 26; Boosalis v. Stevenson, 62 Minn. 193, 64 N. W. 380; Hayward v. Grant, 13 Minn. 165 (Gil. 154), 97 Am. Dec. 228; Jaeger v. Hartman, 13 Minn. 55; Fetz v. Clark, 7 Minn. 217; Stickney v. Smith, 5 Minn. 486; Irvine v. Myers, 4 Minn. 229; Foerster v. Kirkpatrick, 2 Minn. 210; National Ins. Co. v. Bowman, 60 Mo. 252; McJunkin v. Placek, 80 Nebr. 373, 114 N. W. 411; Church v. Callihan, 49 Nebr. 542, 68 N. W. 932; Morrissey v. Schindler, 18 Nebr. 672, 26 N. W. 476; Chamberlain Banking House v. Noyes, 3 Nebr. (Unof.) 550, 92 N. W. 175; Loper v. Welch, 3 Duer (N. Y.) 644; Anable v. Forest &c. Steam Engine Co., 16 Abb. Pr. (N. Y.) 286; Millhiser v. Holleyman, 37 S. Car. 572, 16 S. E. 688; Harle v. Morgan, 29 S. Car. 258, 7 S. E. 487; Bischoff v. Blease, 20 S. Car. 460; Van Brunt &c. Co. v. Harrigan, 8 S. Dak. 96, 65 N. W. 421; Coody v. Shawver (Tex. Civ. App.), 161 S. W. 935.

[9] Hawley Bros. Hardware Co. v. Brownstone, 123 Cal. 643, 56 Pac. 468; Gilman v. Cosgrove, 22 Cal. 356; Anderson v. Brewing Assn., 49 Ind. App. 403, 97 N. E. 445; St. John v. Coates, 63 Hun 460, 18 N. Y. S. 419, 45 N. Y. St. 431; Kessler v.

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engaged in the sale of general merchandise, is wholly insufficient to show any joint or partnership interest. If the complaint seeks a recovery for damage to a partnership business, the averments should show such relation between the plaintiffs as to warrant it."[10] So it is insufficient to plead merely the signing of a contract in a firm name, as showing partnership. As said in one case:[11] "The manner in which the contract was signed by Friedly and Giles would be competent evidence as tending to prove the existence of a partnership between them. * * * Competent evidence tending to prove a material fact, is not the fact, or the equivalent thereof. The fact must be alleged affirmatively before the demurrer admits it to be true. A demurrer admits as true only such allegations as are properly and sufficiently pleaded." A mere allegation in the pleading of joint ownership of mules sought to be recovered is not equivalent to an allegation of partnership as to the mules.[12] This rule as to the clear averment of the fact of partnership applies, for instance, where suit is brought upon a note payable to or endorsed to, a firm in the firm name, for in such case it is necessary to aver a partnership between the plaintiffs under such firm name, in order to show the identity between the plaintiffs and the owners of the claim sued on.[13] If the pleading avers that the partners acquired the cause of action as such, it is not bad for failure to allege that they were

First Nat. Bank, 21 Tex. Civ. App. 98, 51 S. W. 62.

[10] Anderson v. Evansville Brewing Assn., 49 Ind. App. 403, 97 N. E. 445.

[11] McIntosh v. Zaring, 150 Ind. 301, 49 N. E. 164.

[12] Coody v. Shawver (Tex. Civ. App.), 161 S. W. 935.

[13] Lapeyre v. Gales, 2 Cranch (C. C.) 291, Fed. Cas. No. 8081; Keith v. Pratt, 5 Ark. 661; Boswell v. Dunning, 5 Har. (Del.) 231; Wilcox v. Woods, 4 Ill. 51; Irving v. M'Lean, 4 Blackf. (Ind.) 52; Hughes v. Walker, 4 Blackf. (Ind.) 50; Redmond v. Stansbury, 24 Mich. 445; Dessaint v. Elling, 31 Minn. 287, 17 N. W. 480; McGregor v. Cleveland, 5 Wend. (N. Y.) 475; Bentley v. Smith, 3 Caines (N. Y.) 170; Clark v. Kensell, Wright (Ohio) 480; Ege v. Kyle, 2 Watts. (Pa.) 222; Bischoff v. Blease, 20 S. Car. 460; Neely v. Morris, 2 Head (Tenn.) 595, 75 Am. Dec. 753; Howard v. Boorman, 17 Wis. 459; Barnes v. Elmbinger, 1 Wis. 56; Attwood v. Rattenbury, 6 Moore 579, 23 Rev. Rep. 633, 17 E. C. L. 61; Ord v. Portal, 3 Campb. 240.

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partners at the time of suit.[14] But where the partners could recover on the cause sued on as joint owners or joint contractors, it is not necessary that the complaint aver the fact of a partnership.[15] As said in one case:[16] "The defendant demurred, and specified in the demurrer several grounds of objection, but the only one insisted on was that the complaint did not aver that the plaintiffs were partners, and as such had made the sale in question. * * * Such an averment is only necessary when the rights of the plaintiffs to maintain the action depends upon their partnership, but as, without being partners, they might prove a joint ownership and joint contract, and upon such proof would be entitled to recover, the objection was untenable." This rule may apply in an action for goods sold.[17] Thus, it is held,[18] that the absence of an allegation of partnership in the pleadings, where its existence is not necessary to the validity of the claim, is not ground of objection, where the individual names, with the firm names, are given in the title, but that the firm name in the title will be considered descriptio personæ merely, and surplusage. Even where it is proper, and where plaintiffs may be compelled, to show the fact of the partnership relation, the omission is not a fatal defect, and if the other parties submit to the litigation without proper objection, they have been held to have waived the defect.[19] The complaint, where partners sue as plaintiffs,

[14] Klemik v. Henricksen Jewelry Co., 122 Minn. 380, 142 N. W. 871.

[15] Beller v. Block, 19 Ark. 566; McIntosh v. Zaring, 150 Ind. 301, 49 N. E. 164; Hayward v. Grant, 13 Minn. 165 (Gil. 154), 97 Am. Dec. 228; Jaeger v. Hartman, 13 Minn. 55 (Gil 50); Wood v. Fithian, 24 N. J. L. 33, 838; Loper v. Welch, 3 Duer (N. Y.) 644; Cowan v. Baird, 77 N. Car. 201; Martin v. Kelly, Cheves L. (S. Car.) 215. See also Klemik v. Henricksen Jewelry Co., 122 Minn. 380, 142 N. W. 871; Wilson v. Yegen, 38 Mont. 504, 100 Pac. 613; Maynard v. Fellows, 43 N. H. 255; Cowan v. Baird, 77 N. Car. 201; Clark v. Wick, 25 Ore. 446, 36 Pac. 165; Munroe v. Williams, 35 S. Car. 572, 15 S. E. 279; First Nat. Bank v. Hattenback, 13 S. Dak. 365, 83 N. W. 421.

[16] Loper v. Welch, 3 Duer (N. Y.) 644.

[17] Boosalis v. Stevenson, 62 Minn. 193, 64 N. W. 380; Loper v. Welch, 3 Duer (N. Y.) 644; Clark v. Wick, 25 Ore. 446, 36 Pac. 165.

[18] Campbell v. Blanke, 13 Kans. 62; Jaeger v. Hartman, 13 Minn. 55 (Gil. 50).

[19] Howard v. Woodward, 52 Kans. 106, 34 Pac. 348; Keene v. Masterman, 66 Minn. 72, 68 N. W. 771.

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should not only aver the existence of a partnership but should also show the names of the individual partners.[20] However, a defect in a pleading in this respect may usually be cured by amendment,[21] and if there is a joint cause of action the allegation of partnership may be disregarded as surplusage.[22] So if by statute suit in the firm name is permitted, an allegation setting forth the partners' names may be surplusage.[23] In some states certain statutory requirements must be followed before a suit can be maintained in the firm name. It is sometimes held that compliance with these formalities should be alleged in the complaint,[24] but in most jurisdictions noncompliance is a matter of defense, and need not be alleged in a complaint, but must be affirmatively alleged and proved by the defendants.[25] In an action by partners for a broker's commission in effecting a sale,

[20] Haarmann v. Lueders, 109 Fed. 325; Day v. Cushman, 2 Ill. 475; Hellyer v. Bowser, 76 Ind. 35; Clark v. Dunlap, 2 Ind. 551; Marsh v. Chicago &c. R. Co., 79 Iowa 332, 44 N. W. 562; Gordon v. Janney, Morris (Iowa) 182; Wolf v. New Orleans Tailor-Made Pants Co., 52 La. Ann. 1357, 27 So. 893; Voigt Brewery Co. v. Pacifico, 139 Mich. 284, 102 N. W. 739; Stubendorf v. Sonnenschein, 11 Nebr. 235, 9 N. W. 91; Walter v. Godshall, 32 S. Car. 187, 10 S. E. 951; Graves v. Drane, 66 Tex. 658, 1 S. W. 905; Putnam v. Wheeler, 65 Tex. 522; Scott v. Llano County Bank (Tex. Civ. App.), 85 S. W. 301; Howard v. Boorman, 17 Wis. 459.

[21] Vinegar Bend Lumber Co. v. Hamilton-Brown Shoe Co., 129 Ala. 271, 29 So. 857; Loewenberg v. Gilliam, 72 Ark. 314, 79 S. W. 1064; Heyman v. Decatur Street Bank (Ga. App.), 84 S. E. 483; Carlton v. Grissom, 98 Ga. 118, 26 S. E. 77; Smith v. Columbia Jewelry Co., 114 Ga. 698, 40 S. E. 735; Gwinn v. O'Daniel, 5 Tex. Civ. App. 112, 23 S. W. 850; Lewis v. Locke, 41 Vt. 11.

[22] Wilson v. Carter Oil Co., 46 W. Va. 469, 33 S. E. 249.

[23] Phoenix Ins. Co. v. Carnahan, 63 Ohio St. 258, 58 N. E. 805.

[24] New Carlisle Bank v. Brown, 11 Ohio Cir. Ct. 77. See ante §§ 262, 263, 264.

[25] Cook v. Fowler, 101 Cal. 89, 35 Pac. 431; Phillips v. Goldtree, 74 Cal. 151, 13 Pac. 313, 15 Pac. 451; Lee v. Orr, 70 Cal. 398, 11 Pac. 745; Sweeney v. Stanford, 67 Cal. 635, 8 Pac. 444; Smith v. Stubbs, 16 Colo. App. 130, 63 Pac. 955; Croft v. Bain, 49 Mont. 484, 143 Pac. 960; Reilly v. Hatheway, 46 Mont. 1, 125 Pac. 417; Swope v. Burnham, 6 Okla. 736, 52 Pac. 924; Drake v. Great Northern R. Co., 24 S. Dak. 19, 123 N. W. 82; Heegaard v. Dakota L. & T. Co., 3 S. Dak. 569, 54 N. W. 656. See ante §§ 262, 263, 264.

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judgment for the plaintiffs can not be sustained by proof of a contract made with one of them as an individual.[26]

§ 848. Complaint against partnership.—The general principles as to pleading the fact of partnership and the names of the partners are substantially the same in cases where partnerships are defendants as where they are plaintiffs. Generally the fact of partnership need not be alleged in an action against partners as such, it being sufficient to declare against them as against any other joint debtors or joint obligors, since they are bound in the same manner.[27] Thus, in an action on an instrument which shows joint liability of several persons it need not be alleged that they were partners.[28] And where the action is on a promissory note executed by members of a partnership, the makers may be sued as individuals, without declaring against them as partners.[29] If it is not necessary to allege the fact of partnership in an action against partners there is no variance where such fact is not

[26] Michael v. Kennedy, 166 Mo. App. 462, 148 S. W. 983.

[27] Davis v. Abbott, 2 McLean (U. S.) 29, Fed. Cas. No. 3622; Austin v. Beall, 167 Ala. 426, 52 So. 657, Ann. Cas. 1912 A, 510; Jemison v. Dearing, 41 Ala. 283; Swinney v. Burnside, 17 Ark. 38; Hunter v. Martin, 57 Cal. 365; Faust v. Smith, 3 Colo. App. 505, 34 Pac. 261; Pollock v. Glazier, 20 Ind. 262. See also Dobenspec v. Armel, 11 Ind. 31; Ensminger v. Marvin, 5 Blackf. (Ind.) 210; Patten v. Gurney, 17 Mass. 182, 9 Am. Dec. 141; Danaher v. Hitchcock, 34 Mich. 516; Pegg v. Bidleman, 5 Mich. 26; Fellows v. Jernigan, 68 Mo. 434; Stix v. Mathews, 63 Mo. 371; Gates v. Watson, 54 Mo. 585; Lessing v. Sulzbacher, 35 Mo. 445; Smith v. Cain, 180 Mo. App. 457, 166 S. W. 653; Maynard v. Fellows, 43 N. H. 255; Wolf v. Strahl, 54 Hun (N. Y.) 636; Ageloff v. Lakin, 115 N. Y. S. 1082; Oechs v. Cook, 3 Duer (N. Y.) 161; Mack v. Spencer, 4 Wend. (N. Y.) 411; Allen v. Davids, 70 S. Car. 260, 49 S. E. 846; First Nat. Bank v. Hattenback, 13 S. Dak. 365, 83 N. W. 421; Hawley v. Hurd, 56 Vt. 617; Meacham v. Batchelder, 3 Pin. (Wis.) 281, 3 Chand. 316.

[28] Davis v. Abbott, 2 McLean (U. S.) 29, Fed. Cas. No. 3622; Compton v. Smith, 120 Ala. 233, 25 So. 300; Hicks v. Branton, 21 Ark. 186.

[29] Jemison v. Dearing, 41 Ala. 283; Swinney v. Burnside, 17 Ark. 38; Lucas v. Baldwin, 97 Ind. 471; Pollock v. Glazier, 20 Ind. 262; Danaher v. Hitchcock, 34 Mich. 516; Maynard v. Fellows, 43 N. H. 255; Singleton v. Thornton, 45 Hun 589, 9 N. Y. St. 600; Vallett v. Parker, 6 Wend. (N. Y.) 615; Mack v. Spencer, 4 Wend. (N. Y.) 411; Hawley v. Hurd, 56 Vt. 617. See also Pegg v. Bidleman, 5 Mich. 26.

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pleaded, but is proved at the trial.[30] Especially is this held where the contract sued on was made with one person and the fact of partnership is relied on to show joint liability.[31] If objection is not made on trial to the failure to allege a partnership, it will not be considered on appeal.[32] If suit is brought on an obligation executed in the firm name, the complaint should contain the names of the members,[33] although it is usually held sufficient if the names appear in the caption.[34] "Where * * * the names of the plaintiffs are given in full in the title of the cause, it is unnecessary to repeat them in alleging that the plaintiffs were partners. It is sufficient to allege that the plaintiffs were partners without again giving their names."[35] If an allegation of partnership appears in the caption, it need not be alleged in the body of the complaint.[36] In a tort action against a partner or partners, partnership liability is joint and several, it is unnecessary to allege the fact of partnership or the names of the members, and action may be brought against one or less than all the partners, and the whole of the damages asked may be recovered from any

[30] Austin v. Beall, 167 Ala. 426, 52 So. 657, Ann. Cas. 1912 A, 510; Jemison v. Dearing, 41 Ala. 283; Howard v. Woodward, 52 Kans. 106, 34 Pac. 348; Kimball v. Longstreet, 174 Mass. 487, 55 N. E. 177; Stix v. Mathews, 63 Mo. 371; Ward v. Dow, 44 N. H. 45; Mack v. Spencer, 4 Wend. (N. Y.) 411.

[31] Fetz v. Clark, 7 Minn. 217; Stone v. Neeley, 42 Nebr. 567, 60 N. W. 965.

[32] Keene v. Masterman, 66 Minn. 72, 68 N. W. 771.

[33] Wise v. Williams, 72 Cal. 544, 14 Pac. 204; Lucas v. Baldwin, 97 Ind. 471; Rains v. Bolin, 6 Ind. App. 181, 33 N. E. 218; Laing v. Craig, 14 Tex. Civ. App. 134, 36 S. W. 142; Osborne v. Holland, 1 Tex. App. Civ. Cas., § 1087; Rogers v. Verlander, 30 W. Va. 619, 5 S. E. 847. But see Dimond v. Minnesota Sav. Bank, 70 Minn. 298, 73 N. W. 182. Compare United States v. Hughes, 161 Fed. 1021.

[34] Pierson v. Fuhrmann, 1 Colo. App. 187, 27 Pac. 1015; McGregor v. Hubbs, 125 Ind. 487, 25 N. E. 591; Adams Express Co. v. Harris, 120 Ind. 73, 21 N. E. 340, 7 L. R. A. 214, 16 Am. St. 315; Percival v. Groff, 8 Blackf. (Ind.) 233; Rains v. Bolin, 6 Ind. App. 181, 33 N. E. 218; McCloskey v. Strickland, 7 Iowa 259; Kimball v. Longstreet, 174 Mass. 487, 55 N. E. 177. Compare Wendall v. Osborne, 63 Iowa 99, 18 N. W. 709.

[35] Adams Express Co. v. Harris, 120 Ind. 73, 21 N. E. 340, 7 L. R. A. 214, 16 Am. St. 315.

[36] Pierson v. Fuhrman, 1 Colo. App. 187, 27 Pac. 1015; McCloskey v. Strickland, 7 Iowa 259.

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one of them.[37] This rule also applies to actions on contract against partners, where by statute they are jointly and severally liable on such obligations.[38] An allegation that a defendant was a partner with his copartners when he signed an acceptance of an offer which plaintiff made, is not sufficient to show that he was a partner with them in that transaction.[39] It is held in a few jurisdictions that the fact of partnership should be alleged in the complaint in an action against the members of the firm.[40] A bill brought by a general creditor of a firm, which charged insolvency of the partnership, and a conspiracy of its members to hinder and defraud its creditors, which had been partially executed by one partner's absconding and the levy of an attachment by another, was held good on demurrer.[41] It seems that a partnership liability by estoppel by holding out as a partner must be specially pleaded.[42] A petition which alleges a cause of action against the "E & C Grain Company, a partnership composed of E & C," has been held sufficient to justify a judgment against the firm and the individual members.[43]

§ 849. Complaint by or against surviving partner.—A surviving partner should aver in his complaint all the facts needed

[37] Alexandria Min. &c. Co. v. Painter, 1 Ind. App. 587, 28 N. E. 113; Head v. Goodwin, 37 Maine 181; Baker v. Hornick, 51 S. Car. 313, 28 S. E. 941; Ft. Worth & D. C. Ry. Co. v. Shank (Tex. Civ. App.), 167 S. W. 1093; Frank v. Tatum (Tex. Civ. App.), 26 S. W. 900.

[38] Clark v. Jones, 87 Ala. 474, 6 So. 362; Jemison v. Dearing, 41 Ala. 283; McCulloch v. Judd, 20 Ala. 703; Kent v. Wells, 21 Ark. 411; Hicks v. Branton, 21 Ark. 186; Burgen v. Dwinal, 11 Ark. 314; Head v. Goodwin, 37 Maine 181; Cutts v. Gordon, 13 Maine 474, 29 Am. Dec. 520; Redington v. Farrar, 5 Maine 379; Tuttle v. Cooper, 10 Pick. (Mass.) 281; Nutt v. Hunt, 4 Smed. & M. (Miss.) 702; Maynard v. Fellows, 43 N. H. 255; Hartness v. Thompson, 5 Johns. (N. Y.) 160; Gratz v. Stump, Cooke (Tenn.) 494.

[39] Reid v. Lyttle, 150 Ky. 304, 150 S. W. 357.

[40] Petrie v. Newell, 13 Ill. 647; Irvine v. Myers, 4 Minn. 229; Foerster v. Kirkpatrick, 2 Minn. 210; Kessler v. First Nat. Bank of Yoakum, 21 Tex. Civ. App. 98, 51 S. W. 62; Laing v. Craig, 14 Tex. Civ. App. 134, 51 S. W. 62.

[41] Murphy v. Fairweather, 72 W. Va. 14, 77 S. E. 321.

[42] Hamner v. Barker (Tex. Civ. App.), 144 S. W. 1180.

[43] Early & Clement Grain Co. v. Fite (Tex. Civ. App.), 147 S. W. 673.

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to show that he can maintain the action without joining those who were his partners when the claim arose, but it is not absolutely necessary that he should describe himself in terms as surviving partner.[44] The same rule applies as to the averments necessary in an action against a surviving partner.[45] If there is some special ground of liability, such as fraud, it should be clearly pleaded.[46] The joinder as plaintiff of the administrator of a deceased partner with surviving partners, where the surviving partners alone could sue, was held to make the complaint bad as to the administrator and therefore as to all plaintiffs.[47] So a complaint by the administratrix of a deceased partner to recover a share of the profits accruing after his death was held bad, which did not state whether there were firm debts outstanding, whether losses were incurred prior to such death, or whether any settlement or adjustment of the partnership business had ever been had.[48] A new firm which has continued the business of the old one and succeeded to its obligations, must plead an assignment to itself in suing on a claim of the old firm.[49] In a suit against surviving partners for an accounting, the averment of facts showing that the nonresident defendant was the party chiefly delinquent, but also showing that the resident defendant had been

[44] Keith v. Pratt, 5 Ark. 661; Bonne v. Kay, 5 Ark. 19; Hubbell v. Skiles, 16 Ind. 138; Patterson v. Chalmers, 7 B. Mon. (Ky.) 595; Johnson v. Levy, 109 La. 1036, 34 So. 68; Stevens v. Rollins, 34 Maine 226; Reese v. Kinkead, 17 Nev. 447, 30 Pac. 1087; Joyslin v. Taylor, 24 N. H. 268; Ledden v. Colby, 14 N. H. 33, 40 Am. Dec. 173; Daby v. Ericsson, 45 N. Y. 786; Wright v. McCampbell, 75 Tex. 644, 13 S. W. 293; Howard v. Boorman, 17 Wis. 459; French v. Andrade, 6 Term. Rep. 582; Slipper v. Stidstone, 5 Term. Rep. 493, 1 Esp. 47.

[45] Hess v. Adler, 67 Ark. 444, 55 S. W. 843; Pattison v. Norris, 29 Ind. 165; Culbertson v. Townsend, 6 Ind. 64; Bradley v. Ward, 6 Blackf. (Ind.) 190; Raborg v. Columbia Bank, 1 Harr. & G. (Md.) 231; Fried v. Burk, 125 Md. 500, 94 Atl. 86; Berkey v. Judd, 12 Minn. 52; Tom v. Goodrich, 2 Johns. (N. Y.) 213; Hoeflinger v. Wells, 47 Wis. 628, 3 N. W. 589. See Burgess v. American Bond &c. Co., 103 Maine 378, 69 Atl. 573.

[46] McCartney v. Boyd (Wis.), 152 N. W. 820.

[47] Hayes v. Johnson, 56 Ind. App. 238, 105 N. E. 164.

[48] Boehme v. Fitzgerald, 43 Mont. 226, 115 Pac. 413.

[49] Needham v. Wright, 140 Ind. 190, 39 N. E. 510; Spalding v. Mure, 6 Term. Rep. 363.

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connected with his codefendant in the management and control of the business since the death of plaintiff's decedent, and was withholding from plaintiff the information sought, and was in some degree responsible for the surviving partner's failure to account to her or to her testator in his lifetime for his interest in the concern, made the resident defendant an actual and not a mere nominal defendant.[50]

§ 850. Complaints—In suits between partners.—In suits between partners upon partnership matters, the partnership relation should be alleged, as should also the contents of the partnership agreement, and, incidentally, the respective partner's rights and liabilities thereunder. If there has been a dissolution of the firm, this should be alleged. If not, and a dissolution and accounting are desired, the grounds for such relief should be set forth.[51] And in an action by a partner for a dissolution it is essential to aver facts which show him entitled to the relief sought.[52] In an action by a partner for an accounting after

[50] O'Brien v. O'Brien, 16 Cal. App. 193, 116 Pac. 696.

[51] Glover v. Hembree, 82 Ala. 324, 8 So. 251; Fischer v. Superior Ct., 98 Cal. 67, 32 Pac. 875; Cuyamaca Granite Co. v. Pacific Paving Co., 95 Cal. 252, 30 Pac. 525; Chalmers v. Chalmers, 81 Cal. 81, 22 Pac. 395; Young v. Pearson, 1 Cal. 448; Tarabino v. Nicoli, 5 Colo. App. 545, 39 Pac. 362; Moran v. Bentley, 69 Conn. 392, 37 Atl. 1092; Canfield v. Hard, 6 Conn. 180; Nims v. Nims, 23 Fla. 69, 1 So. 527; Floyd v. Kicklighter, 139 Ga. 133, 76 S. E. 1011; Bracken v. Kennedy, 4 Ill. 558; Acme Copying Co. v. McLure, 41 Ill. App. 397; Adams v. Shewalter, 139 Ind. 178, 38 N. E. 607; Dehority v. Nelson, 56 Ind. 414; Carlin v. Donegan, 15 Kans. 495; Glenn v. Hebb, 12 Gill & J. (Md.) 271; Houghton v. State Mut. L. Assur. Co., 110 Mich. 308, 68 N. W. 142; Stern v. Harris, 40 Minn. 209, 41 N. W. 1036; Whitney v. Cotten, 53 Miss. 689; Pope v. Salsman, 35 Mo. 362; McMahon v. Thornton, 4 Mont. 46, 1 Pac. 724; Dickey v. Allen, 2 N. J. Eq. 40; Bell v. Merrifield, 109 N. Y. 202, 16 N. E. 55, 4 Am. St. 436; Salter v. Ham, 31 N. Y. 321; Scott v. Pinkerton, 3 Edw. Ch. (N. Y.) 70; Ludington v. Taft, 10 Barb. (N. Y.) 447; Eisner v. Eisner, 5 App. Div. 117, 38 N. Y. S. 671; Haberkorn v. Hill, 2 N. Y. S. 243; Weber v. Kemper, 7 Cinc. Wkly. L. Bul. 301, 8 Ohio Dec. 403; Gray v. Kerr, 46 Ohio 652, 23 N. E. 136; Holladay v. Elliott, 3 Ore. 340; Congdon v. Aylsworth, 16 R. I. 281, 18 Atl. 247; Jones v. Smith, 31 S. Car. 527, 10 S. E. 340; Blakely v. Smock, 96 Wis. 611, 71 N. W. 1052.

[52] Bradley v. Harkness, 26 Cal. 69; Duffield v. Brainerd, 45 Conn. 424; Adams v. Shewalter, 139 Ind. 178, 38 N. E. 607; Kimble v. Seal, 92 Ind.

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dissolution, the existence and dissolution of the partnership should be averred, and that there has been no settlement and facts showing plaintiff's right to an accounting or that a balance will be due him.[58] A petition which alleges a partnership, and that the plaintiff was wrongfully excluded from the business, and prays an accounting, but which does not show the terms of the agreement, or the plaintiff's interest in the profits, is subject to de-

276; Dehority v. Nelson, 56 Ind. 414; Havener v. Stephens, 58 S. W. 372, 22 Ky. L. 498; Fooks v. Williams, 120 Md. 436, 87 Atl. 692; Arnold v. Sinclair, 11 Mont. 556, 29 Pac. 340, 28 Am. St. 489; Waite v. Aborn, 60 App. Div. 520, 69 N. Y. S. 967; Smith v. Lamon (Tex. Civ. App.), 143 S. W. 304; Keith v. Aubrey (Tex. Civ. App.), 127 S. W. 278; Holder v. Shelby (Tex. Civ. App.), 118 S. W. 590; Roberts v. Dunham, 1 C. Pl. 136; Master v. Kirton, 3 Ves. Jr. 74, 30 Eng. Reprint 901. See also Rassaert v. Mensch, 17 Cal. App. 637, 120 Pac. 1072; Brandt v. Salomonson, 17 Cal. App. 395, 119 Pac. 946; Pritchett v. Kennedy, 140 Ga. 248, 78 S. E. 902; Wehmeier v. Banking Co., 49 Ind. App. 454, 97 N. E. 558; Davis v. Niswonger, 145 Ind. 426, 44 N. E. 542; Candee v. Baker, 131 App. Div. 641, 116 N. Y. S. 55.

[58] Einstein v. Schnebly, 89 Fed. 540; Dugger v. Tutwiler, 129 Ala. 258, 30 So. 91; Haynes v. Short, 88 Ala. 562, 7 So. 157; Bremner v. Leavitt, 109 Cal. 130, 41 Pac. 859; Young v. Pearson, 1 Cal. 448; Buckley v. Kelly, 70 Conn. 411, 39 Atl. 601; Oliver v. House, 125 Ga. 637, 54 S. E. 732; Houston v. Polk, 124 Ga. 103, 52 S. E. 83; Wells v. Strange, 5 Ga. 22; Bracken v. Kennedy, 4 Ill. 558; Gutsch Brewing Co. v. Fischbeck, 41 Ill. App. 400; Frederick v. Cooper, 3 Iowa 171; Carlin v. Donegan, 15 Kans. 495; Borah v. O'Niell, 116 La. 672, 41 So. 29; Hunt v. Gorden, 52 Miss. 194; Pope v. Salsman, 35 Mo. 362; Shriver v. McCloud, 20 Nebr. 474, 30 N. W. 534; Patterson v. Sadler (N. J. Ch.), 63 Atl. 1115; Emrick v. Goldstein, 103 App. Div. 17, 92 N. Y. S. 680; Schulsinger v. Blau, 84 App. Div. 390, 82 N. Y. S. 686; Teschmacher v. Lenz, 82 Hun 594, 31 N. Y. S. 543; Ludington v. Taft, 10 Barb. (N. Y.) 447; Reeves v. Bushby, 25 Misc. 226, 55 N. Y. S. 70; Ketchum v. Lewis, 64 Hun 638, 19 N. Y. S. 452, 46 N. Y. St. 875; Redfield v. Middleton, 1 Abb. Pr. (N. Y.) (N. S.) 15; McMurray v. Rawson, 3 Hill (N. Y.) 59; Champion v. Williams, 2 Ohio S. & C. P. Dec. 388, 2 Ohio N. P. 329; Everhart v. Everhart, 3 Luz. Leg. Reg. (Pa.) 217; Bachman v. Einhorn, 12 Phila. (Pa.) 391; Harris v. Donavan, 33 Pitts. Leg. J. (N. S.) 286; Harkins v. Buxton, 11 Pa. Dist. 159; Congdon v. Aylesworth, 16 R. I. 281, 18 Atl. 247; Wright v. Ross, 30 Tex. Civ. App. 207, 70 S. W. 234; Owen v. Oviatt, 4 Utah 95, 6 Pac. 527; Park v. McGowen, 64 Vt. 173, 23 Atl. 855; Wood v. Wood, 50 W. Va. 570, 40 S. E. 416; Coville v. Gilman, 13 W. Va. 314; Good v. Blewitt, 13 Ves. 397, 33 Eng. Reprint 343. See Dondell v. Shoo, 20 Cal. App. 424, 129 Pac. 478; Valentin v. Sarrett, 25 Idaho 517, 138 Pac. 834; Fried v. Burk,

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murrer.[54] Any claims to special relief such as fraudulent conduct of a partner, an award by arbitrators, an account stated, or a lien on property, must be supported by allegations of fact showing the ground of the claim.[55] The partner suing in such action should definitely state the relief desired.[56] But pleadings will be liberally construed in this respect. It was said in one case:[57] "If the case upon the evidence, did not entitle complainants to a return of their capital, and to be placed in the same situation, as far as practicable, as if they had never entered into the partnership, but did authorize the ordinary decree for a dissolution and accounting, we are of opinion that relief could be awarded in the latter aspect, even though the bill were not framed with precision, in the alternative, for a cancelation or for a dissolution and accounting. If the specific prayer were insufficient, such a decree could be maintained under the prayer for general relief, since it would be conformable to the case made by the bill." An assignee of a partner who brings an action for an accounting must state in his complaint facts entitling him to such relief.[58] Statements of opinion should not be inserted, and, if they are

125 Md. 500, 94 Atl. 86; Chappell v. Chappell, 125 App. Div. 127, 109 N. Y. S. 648; Valentine v. Gilborne, 27 S. Dak. 309, 130 N. W. 1018; Knopsnyder v. Quinn, 68 W. Va. 577, 70 S. E. 363.

[54] Rose v. Moate (Ga.), 87 S. E. 20.

[55] Campbell v. Clark, 101 Fed. 972, 42 C. C. A. 123; Reese v. McCurdy, 121 Ala. 425, 25 So. 918; Foster v. Carr, 135 Cal. 83, 67 Pac. 43; Rassaert v. Mensch, 17 Cal. App. 637, 120 Pac. 1072; Tarabino v. Nicoli, 5 Colo. App. 545, 39 Pac. 362; Levi v. Karrick, 13 Iowa 344; Jaynes v. Goepper, 147 Mass. 309, 17 N. E. 831; Shackleton v. Kneisley, 48 Minn. 451, 51 N. W. 470; Nicholas v. Hadlock (Mo. App.), 180 S. W. 31; Harrison v. Farrington, 36 N. J. Eq. 107; Somers v. Harris, 161 App. Div. 230, 146 N. Y. S. 572; Candee v. Baker, 131 App. Div. 641, 116 N. Y. S. 55; Simpson v. Simpson, 44 App. Div. 492, 60 N. Y. S. 879; Straus v. Heyenga, 41 Hun 646, 5 N. Y. St. 37; Gernt v. Cusack, 106 Tenn. 141, 59 S. W. 335; Hunter v. Tolbard, 47 W. Va. 258, 34 S. E. 737.

[56] Oteri v. Scalzo, 145 U. S. 578, 36 L. ed. 824, 12 Sup. Ct. 895; Bennett v. Woolfolk, 15 Ga. 213; Adams v. Shewalter, 139 Ind. 178, 38 N. E. 607; Dehority v. Nelson, 56 Ind. 414; Richard v. Mouton, 106 La. 435, 30 So. 894; Thompson v. Walker, 39 La. Ann. 892, 2 So. 789; Von Tagen v. Roberts, 4 Leg. Op. (Pa.) 610.

[57] Oteri v. Scalzo, 145 U. S. 578, 36 L. ed. 824, 12 Sup. Ct. 895.

[58] Cuyamaca Granite Co. v. Pacific Paving Co., 95 Cal. 252, 30 Pac. 525; Sheldon v. Stevens, 32 Misc. 314, 66 N. Y. S. 796.

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inserted, are demurrable, or add nothing to the force and effect of the pleading.[59] It is often difficult to distinguish as to whether an allegation is one of fact or of opinion, but an application of the usual and ordinary rules of construction will usually determine the question. By the laws of most states, there are certain preliminary requisites before a surviving partner can close a partnership. These should be shown to have been complied with. The same rule applies to the administrator of a deceased partner before he can commence suit for an accounting against the surviving partner.[60] Under the codes, it is often made necessary that copies of instruments sued upon be attached to the petition or complaint as exhibits. It would seem, however, that articles of partnership are not such instruments which must be attached. There is a general rule of law that one partner can not sue his copartner in regard to firm matters. There are exceptions to this rule, and where one partner does so sue his copartner, he must offset this general rule by affirmatively alleging the exception, and its application to his case. For instance, one may sue the other upon an ascertained balance,[62] and in an action for a balance due, the complaint must show a settlement of firm affairs and a determination of the amount due the plaintiff partner.[63] And where there is an action between partners on a contract outside of partnership matters, and as to which a partnership accounting is not necessary, such facts must appear in the complaint.[64] "A complaint upon a written contract of copartnership between the plaintiff

[59] Einstein v. Schnebly, 89 Fed 540.

[60] Krutz v. Craig, 53 Ind. 561.

[62] Neil v. Greenleaf, 26 Ohio St. 567; McDonald v. Holmes, 22 Ore. 212, 29 Pac. 735.

[63] Bean v. Gregg, 7 Colo. 499, 4 Pac. 903; Wood v. Deutchman, 80 Ind. 524; Williamson v. Haycock, 11 Iowa 40; Wycoff v. Purnell, 10 Iowa 332; Schulsinger v. Blau, 84 App. Div. 390, 82 N. Y. S. 686; Mackey v. Auer, 8 Hun (N. Y.) 180; Covert v. Henneberger, 53 How. Pr. (N. Y.) 1; Torrey v. Twombly, 57 How. Pr. (N. Y.) 149; Glass v. Wiles (Tex.), 14 S. W. 225; Edwards v. Remington, 51 Wis. 336, 8 N. W. 193.

[64] Benton v. Hunter, 119 Ga. 381, 46 S. E. 414; Child v. Swain, 69 Ind. 230; McCament v. Gray, 6 Blackf. (Ind.) 233; Lewis v. Woolfolk, 2 Pin. (Wis.) 209, 1 Chandl. 171: Walker v. Harris, 1 Anst. 245.

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and the defendant, alleging full performance on the plaintiff's part, and facts showing that the defendant has grossly violated his duties under said contract and wholly failed to perform his part thereof, and further alleging that, by reason of such failure of the defendant to perform his part of said contract, the plaintiff has sustained damages in a certain sum, for the recovery of which judgment is demanded, is sufficient to show a breach by the defendant of his part of said contract, and that by reason of such breach the plaintiff has sustained damages at least to the extent of the sum paid by him to the defendant as an inducement to the formation of said copartnership."[65] Whatever the condition may be, taking the particular case out of the general rule, it must be alleged, or the pleading is subject to demurrer, as it shows no cause of action otherwise.

§ 851. Some particular examples.—Omission in a complaint in action to recover a partner's share of unadjusted items to plead a partnership settlement, is cured by an answer which pleads dissolution and settlement.[66] A pleading in an action on a note alleging a partnership of plaintiff and defendant, and that there had been no accounting between them but which did not allege the facts showing a partnership, was held insufficient.[67] A petition by a partner against his copartner on a dissolution agreement alleging that the copartner in consideration of the division of firm property agreed to pay all bills contracted by either partner or in the firm name, that the copartner had executed notes for the price of property delivered to the partner on the division of the firm property, that the copartner refused to pay the note, and that the partner was compelled to pay it, was held to authorize a recovery without regard to a provision in the agreement binding the copartner to pay notes executed by him alone.[68] Where a pleading for dissolution of a partnership alleged that it was agreed that each partner should devote his entire time to the

[65] Child v. Swaim, 69 Ind. 230.

[66] Jackson v. Powell, 110 Mo. App. 249, 84 S. W. 1132. Compare Black v. Berg, 101 Minn. 9, 111 N. W. 386.

[67] Nixon v. Woodward, 6 Ala. App, 151, 60 So. 480.

[68] Psinakas v. Magas, 161 Mo. App. 19, 142 S. W. 1086.

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business, the defendant may be charged with plaintiff's services, or the amount paid to a servant to do work the defendant should have done.[69] A bill in equity can not be maintained against two defendants for an accounting of partnership profits from the sale of lands where it appears that plaintiff and one of the defendants and a third partner had purchased the lands for resale, and, after the third partner had removed to another state, the two defendants had sold the lands, without showing that the third partner had withdrawn from the firm and that the second defendant had been substituted as partner in his place, since the withdrawal of the original third partner was an essential element of plaintiff's right to recover, as such third partner if he had not withdrawn, would be entitled to share in the profits and to an accounting therefor.[70] A complaint for a breach of contract binding a partner selling his interest not to engage in a similar business within the city which merely alleged that defendant engaged in business within the county was insufficient.[71] A petition, in an action for a partnership dissolution and an accounting, and for a receiver, required to be verified, which was sworn to positively as to matters within plaintiff's knowledge, and verified on belief insofar as the knowledge was derived from others, most of the allegations which related to matters within plaintiff's personal knowledge, and almost all which did not do so were admitted in the answer, was held sufficient.[72] An allegation that the property used in the partnership business was to be paid for out of the profits of the business and rents from the real property, and that payments on the purchase-price of land had been made from such rents and profits, was sufficient to show that a plaintiff partner was to have an interest in the property.[73] A petition alleging a partnership and that the plaintiff was wrongfully excluded from the business, praying an accounting, but not

[69] Valentin v. Sarrett, 25 Idaho 517, 138 Pac. 834.

[70] Heck v. Collins, 231 Pa. 357, 80 Atl. 535.

[71] Du Bois v. Padgham, 18 Cal. App. 298, 123 Pac. 207.

[72] Pritchett v. Kennedy, 140 Ga. 248, 78 S. E. 902.

[73] Doudell v. Shoo, 20 Cal. App. 424, 129 Pac. 478.

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showing the terms or the plaintiff's interest in profits is demurrable.[73a] In an action for a partnership accounting it was held that an averment that under the partnership agreement real estate purchased "should be and become partnership assets" meant that it should become such when acquired, and not that it should become such only when fully paid for.[74] In a suit for an accounting of a partnership which had extended for over twenty years, the court could require the plaintiff to furnish a bill of particulars.[75]

§ 852. Alleging legal conclusions.—The usual rule that legal conclusions need not be averred, but that the facts upon which the legal conclusions are based must be set forth, governs in partnership as in other actions. There is a legal presumption, when a partnership is shown, that each partner is the agent of the firm in conducting the usual business of the firm, in the usual manner, and that if such is not the case, by reason of special contract, it is a matter of affirmative defense. Hence, if the firm is sued upon the act of one of the partners, done in the scope, or apparent scope of his authority, an allegation that the partner was authorized to perform the act is unnecessary unless the question is raised by answer of defendant.[76] Likewise, an allegation that certain persons were partners and that one of them acted for and on behalf of the firm, sufficiently alleges that the act was

[73a] Rose v. Moate (Ga.), 87 S. E. 20.

[74] Doudell v. Shoo, 20 Cal. App. 424, 129 Pac. 478.

[75] Richards v. Miller, 153 N. Y. S. 388.

[76] U. S. Bank v. Binney, 5 Mason (U. S.) 176, Fed. Cas. No. 16791; Knapp v. McBride, 7 Ala. 19; Findlay v. Stevenson, 3 Stew. (Ala.) 48; Miller v. Hines, 15 Ga. 197; Moffitt v. Roche, 92 Ind. 96; Vienne v. Harris, 14 La. Ann. 382; Mercantile Bank v. Cox, 38 Maine 500; Barrett v. Swann, 17 Maine 180; Waldo Bank v. Greely, 16 Maine 419; Manning v. Hays, 6 Md. 5; Thurston v. Lloyd, 4 Md. 283; Etheridge v. Binney, 9 Pick. (Mass.) 272; Manufacturers' &c. Bank v. Winship, 5 Pick. (Mass.) 11, 16 Am. Dec. 369; Carrier v. Cameron, 31 Mich. 373, 18 Am. Rep. 192; Hickman v. Kunkle, 27 Mo. 401; Tutt v. Addams, 24 Mo. 186; Feust v. Brown, 23 Mo. App. 332; Standard Oil Co. v. Hoese, 57 Nebr. 665, 78 N. W. 292; Norton v. Thatcher, 8 Nebr. 186; Vallett v. Parker, 6 Wend. (N. Y.) 615; Haldeman v. Middletown Bank, 28 Pa. St. 440, 70 Am. Dec. 142; Ihmsen v. Negley, 25 Pa. St. 297; Cunningham v. Smithson, 12 Leigh (Va.) 32.

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the act of the firm.[77] If, however, it appears in the petition that the act done was not one within the usual scope of the firm business, it must be shown by affirmative averment that the act was done by express authority, or some other showing must be made which would bring it within the actual scope of the firm business.[78]

§ 853. **Material matters.**—Careful consideration should be given each allegation of the petition (and other pleadings as well) upon the question of its materiality. If material and at the same time complying with other rules of pleading, it should be inserted. If immaterial, this in itself should be a bar to its insertion. The same general rules apply in partnership cases as in those governed by other branches of the law. Irrelevant matter has been held to render a petition for a breach of contract to form a partnership subject to special demurrers.[79]

§ 854. **Answer.**—Every allegation of the petition, which is not denied, either generally or specially, must be taken as true. Hence, every allegation of the petition, which the defendant wishes to put at issue, should be met by a denial in the answer. Often the nonexistence of the alleged partnership is a proper defense, as, for example, where the liability upon which suit is brought was incurred solely by one person, and another person is joined, on the grounds that there is a partnership relation between him and the person incurring the liability, such as would make both liable. In such a case a general denial puts in issue the fact of partnership, inasmuch as its existence would be necessary to liability to the one not acting.[80] The above is a

[77] Duckwell v. Jones, 156 Ind. 682, 58 N. E. 1055.

[78] Alsop v. Central Tr. Co., 100 Ky. 375, 38 S. W. 510.

[79] Lane v. Lodge, 139 Ga. 93, 76 S. E. 874.

[80] Fetz v. Clark, 7 Minn. 217. See also McKissack v. Witz, 120 Ala. 412, 25 So. 21; Rogers v. Nuckolls, 2 Colo. 281; Martin v. Trainer, 125 Ill. App. 474; Graham v. Henderson, 35 Ind. 195; Fletcher v. Dana, 4 Blackf. (Ind.) 377; Hayner v. Eberhardt, 37 Kans. 308, 15 Pac. 168; McKasy v. Huber, 65 Minn. 9, 67 N. W. 650; Fetz v. Clark, 7 Minn. 217; Irvine v. Myers, 4 Minn. 229; Wales v. Chamblin, 19 Mo. 500; Harvey v. Walker, 59 Hun 114, 35 N. Y. St. 765, 13 N. Y. S. 170; Richmond v.

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defense only when the suit is commenced against the one solely by reason of his alleged partnership relation. In case the petition alleges that the act sued upon was a joint act of both defendants, the answer that there was no partnership is bad, as the question of partnership is immaterial. No question of partnership agency arises, but only a question of the joint act of the defendants personally.[81] In some states the rule is that existence of a partnership must be denied specially by verified plea or affidavit.[82] Thus, some statutes provide that when defendants are sued as partners, the fact of partnership can only be denied by verified

Boyd; 130 Tenn. 187, 169 S. W. 755; Burton v. Bostwick, Brayt. (Vt.) 195; Palmo v. Slayden & Co., 100 Tex. 13, 92 S. W. 796.

[81] Hunter v. Martin, 57 Cal. 365.

[82] Byrd v. Gasquet, Hempst. (U. S.) 261, Fed. Cas. No. 2268a; Bank v. Mercantile Co., 163 Ala. 495, 50 So. 882; Goetter v. Head, 70 Ala. 532; New York &c. Contracting Co. v. Meyer, 51 Ala. 325; Bell v. Crosby, 4 Ala. 575; McCollum v. Cushing, 22 Ark. 540; Trowbridge v. Pitcher, 4 Ark. 157; Waterman v. Glisson, 115 Ga. 773, 42 S. E. 95; Crockett v. Garrard, 4 Ga. App. 360, 61 S. E. 552; Eaves v. Field, 8 Ga. App. 69, 68 S. E. 556; Heidenreich v. Bremner, 260 Ill. 439, 103 N. E. 275; Mulhall v. Gillespie, 89 Ill. 346; Zuel v. Bowen, 78 Ill. 234; Degan v. Singer, 41 Ill. 28; Heintz v. Cahn, 29 Ill. 308; Robinson v. Magarity, 28 Ill. 423; McKinney v. Peck, 28 Ill. 174; Shufeldt v. Seymour, 21 Ill. 524; Haywood v. Harmon, 17 Ill. 477; Warren v. Chambers, 12 Ill. 124; Stevenson v. Farnsworth, 7 Ill. 715; Bredhoff v. Lepman, 181 Ill. App. 247. Compare Chicago Stamping Co. v. Bignall, 54 Ill. App. 312; Langdell v. Harney, 36 Ill. App. 406; Bensley v. Brockway, 27 Ill. App. 410; Aultman &c. Co. v. Webber, 4 Ill. App. 427; Fergus v. Cleveland Paper Co., 3 Ill. App. 629; Chicago University v. Emmert, 108 Iowa 500, 79 N. W. 285; Hirsch v. Shafer, 66 Miss. 439, 6 So. 229; Cook v. Martin, 13 Miss. 379; Meeks v. Min. Co., 141 Mo. App. 648, 124 S. W. 1084; Tyrrel v. Milliken, 135 Mo. App. 293, 115 S. W. 512; Donk Bros. Coal &c. Co. v. Aronson, 102 Mo. App. 590, 77 S. W. 132; Drumm Flato Comm. Co. v. Summers, 89 Mo. App. 300; Richards v. McNemee, 87 Mo. App. 396; Mitchell v. Railton, 45 Mo. App. 273; Haysler v. Dawson, 28 Mo. App. 531; Reiter v. Fruh, 150 Pa. St. 623, 24 Atl. 347; Vanzandt v. Massey, 12 Phila. (Pa.) 340; Sinkler v. Lambert, 5 Phila. (Pa.) 36; Wallace v. Taylor, 1 Phila. (Pa.) 74, 7 Leg. Int. (Pa.) 114; Richmond v. Boyd, 130 Tenn. 187, 169 S. W. 755; Gulf &c. R. Co. v. Edloff, 89 Tex. 454, 34 S. W. 414, 35 S. W. 144; Smith v. Western Union Tel. Co., 84 Tex. 359, 19 S. W. 441, 31 Am. St. 59; International &c. R. Co. v. Tisdale, 74 Tex. 8, 11 S. W. 900, 4 L. R. A. 545; Lindsay v. Jaffray, 55 Tex. 626; Congdon v. Monroe, 51 Tex. 109; Lewis v. Lowery, 31 Tex. 663; Lee v. Hamilton, 12 Tex. 413; Woolsey v. Henke, 125

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plea, or affidavit, or it is taken as admitted,[83] while other statutes apply only to actions by partnerships, and in actions against partnerships the fact of partnership may be put in issue by an unsworn denial.[84] It has been held that where there is no plea denying partnership, the burden of proving that there is no partnership and no liability rests on the alleged partner.[85] If the existence of a partnership is alleged and it is not denied in the proper manner, if denial is necessary, then it is unnecessary to prove its existence.[86] In any case where a general denial

Wis. 134, 103 N. W. 267; Lago v. Walsh, 98 Wis. 348, 74 N. W. 212; Martin v. American Express Co., 19 Wis. 336; Fisk v. Tank, 12 Wis. 276, 78 Am. Dec. 737; Barnes v. Elmbinger, 1 Wis. 56; Underwriters v. Wiley (Tex. Civ. App.), 147 S. W. 629; Good v. Galveston &c. R. Co. (Tex.), 11 S. W. 854, 4 L. R. A. 801; Wisconsin Rev. Stats., ch. 137, § 98. Compare National Bldg. &c. Co. v. Gosnell, 116 Md. 640, 82 Atl. 557; Rice v. Patterson, 92 Miss. 666, 46 So. 255.

[83] Curtis v. Sexton, 252 Mo. 221, 159 S. W. 512; Elm City Lumber Co. v. Haupt, 50 Pa. Super. Ct. 489; O. H. Broun, Jr., Timber Co. v. Coleman (Ala.), 67 So. 243; Johnson v. Dyess (Tex. Civ. App.), 149 S. W. 203; Ginners' Mut. Underwriters v. Wiley (Tex. Civ. App.), 147 S. W. 629.

[84] Richmond v. Boyd, 130 Tenn. 187, 169 S. W. 755.

[85] Bredhoff v. Lepman, 181 Ill. App. 247.

[86] Porter v. Graves, 104 U. S. 171, 26 L. ed. 691; Shuttleworth v. Marx, 159 Ala. 418, 49 So. 83; Teller v. Hartman, 16 Colo. 447, 27 Pac. 947; Smith v. Cisson, 1 Colo. 29; Smith v. Westcott, 34 Fla. 430, 16 So. 332; Henderson Warehouse Co. v. Brand, 105 Ga. 217, 31 S. E. 551; Crockett v. Garrard, 4 Ga. App. 360, 61 S. E. 552; Bredhoff v. Lepman, 181 Ill. App. 247; Wabash Portland Cement Co. v. Bracey, 160 Ill. App. 18; Rees v. Simons, 10 Ind. 82; Richards v. Hellen, 153 Iowa 66, 133 N. W. 393; Fennell v. Myers, 76 S. W. 136, 25 Ky. L. 589; Craig v. Chipman, 57 S. W. 244, 22 Ky. L. 322; Irvine v. Myers, 4 Minn. 229; Curtis v. Sexton, 252 Mo. 221, 159 S. W. 512; Nephler v. Woodward, 200 Mo. 179, 98 S. W. 488; Vanhoosier v. Dunlap, 117 Mo. App. 529, 93 S. W. 350; Jameson v. Franklin, 6 How. (Miss.) 376; Anable v. Conklin, 25 N. Y. 470; Fairchild v. Rushmore, 8 Bosw. (N. Y.) 698; Hand v. Rogers, 8 Misc. 79, 58 N. Y. St. 821, 28 N. Y. S. 521; Haberkorn v. Hill, 2 N. Y. S. 243; State v. McMaster, 13 N. Dak. 58, 99 N. W. 58; Laferty v. Sheriff, 2 Monaghan (Pa.) 202, 16 Atl. 90; O'Brien v. Levin, 11 Pa. Dist. 729; Lang v. Jenkins, 12 Pa. Co. Ct. 634; Texas Cent. R. Co. v. Pool, 52 Tex. Civ. App. 307, 114 S. W. 685; Phaup v. Stratton, 9 Grat. (Va.) 615; Ruffner v. Montgomery, 61 W. Va. 62, 56 S. E. 388; Elliott v. Espenhain, 54 Wis. 231, 11 N. W. 513; Johnson v. Dyess (Tex. Civ. App.), 149 S. W. 203; Neal v. Adkins (Tex. Civ. App.), 145 S. W. 265.

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which reaches the fact of partnership, or a special denial of the fact of partnership, would be available, it must be in a case where the liability is based upon the fact of partnership. A plea that defendants in a personal injury case, alleged in the declaration to be partners, were not the owners of the horse and wagon which caused the injury, does not put the fact of partnership in issue.[87] The fact of partnership, though not denied by a defendant's affidavit, may be put in issue by a plea to which a replication is filed, and then it is held the burden is on plaintiff to prove such fact.[88] If the partnership is denied under oath, the burden rests on the plaintiff to prove the partnership.[89] Where an instrument sued on was signed in a firm name, a defendant who did not appear on the face of the instrument as a member of the firm, might prove nonmembership without a verified denial.[90] An answer by an alleged surviving partner, denying plaintiff's ownership of notes in the firm name sued on and also denying that defendant executed them, but which failed to deny that they were executed by the firm and that defendant was a member thereof, or so conducted himself as to be estopped from denying his liability on them was insufficient.[91]

§ 855. Answer in actions between partners.—In actions at law between partners the defendant partner may plead in general denial, which controverts all matters in the complaint which the plaintiff is required to prove.[92] Thus, in an action for accounting between partners, defendant may show under a general denial that the plaintiff retained certain profits.[93] The defendant

[87] Heidenreich v. Bremner, 260 Ill. 439, 103 N. E. 275.

[88] National Bldg. &c. Co. v. Gosnell, 116 Md. 640, 82 Atl. 557; Commercial Jewelry Co. v. Hite, 161 Mo. App. 465, 144 S. W. 153.

[89] Staten Auto Co. v. Hogg (Tex. Civ. App.), 160 S. W. 982.

[90] Richmond v. Boyd, 130 Tenn. 187, 169 S. W. 755.

[91] Letson v. Hall, 1 Ala. App. 619, 55 So. 944.

[92] Johnston v. Preer, 51 Ga. 313; Hackney v. Williams, 46 Ind. 413; Noble v. Martin, 7 Mart. (N. S.) (La.) 282; Wheelock v. Rice, 1 Dougl. (Mich.) 267; Short v. Taylor, 137 Mo. 517, 38 S. W. 952, 59 Am. St. 508; Buffkin v. Eason, 110 N. Car. 264, 14 S. E. 749; Reiter v. Morton, 96 Pa. St. 229.

[93] Lesh v. Davidson, 181 Ind. 429, 104 N. E. 642.

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may plead specially that the complaint is brought on a matter relating to unsettled partnership affairs;[94] or may demur to the pleading.[95] An answer to a bill in equity by a partner for accounting should be certain and should respond to the entire pleading.[96]

§ 856. **Cross-complaint.**—Affirmative relief can not be secured without filing a cross-complaint,[97] unless the accounting itself involves such right.[98] If a bill for an accounting between partners contains a statement that the complainant is ready and willing and offers to pay defendant what, if anything, appears to be due on taking the account, it is not necessary for defendant to file a cross-bill in order to obtain any relief which he may seek on the subject of an account.[99] The validity of a cross-complaint is determined by the same rules governing the

[94] Hutcheson v. Smith, 5 Ir. Eq. 117; Conger v. Platt, 25 U. C. Q. B. 277. See also McSherry v. Brooks, 46 Md. 103.

[95] Ridgway v. Grant, 17 Ill. 117; Mackey v. Auer, 8 Hun (N. Y.) 180; Crooks v. Smith, 1 Grant Ch. (U. C.) 356.

[96] Danels v. Taggart, 1 Gill & J. (Md.) 311; Carter v. Holbrook, 3 Cush. (Mass.) 331; Burditt v. Grew, 8 Pick. (Mass.) 108; Major v. Todd, 84 Mich. 85, 47 N. W. 841; Gordon v. Hammell, 19 N. J. Eq. 216; Isles v. Tucker, 5 Duer (N. Y.) 393; Joseph v. Herzig, 135 App. Div. 141, 120 N. Y. S. 34; Reeves v. Bushby, 25 Misc. 226, 55 N. Y. S. 70; Tennant v. Guy, 3 N. Y. S. 697; Scott v. Pinkerton, 3 Edw. (N. Y.) 70; Innes v. Evans, 3 Edw. (N. Y.) 454; Everitt v. Watts, 3 Edw. (N. Y.) 486; Cresson's Appeal, 91 Pa. St. 168; Koons v. Bute, 2 Phila. (Pa.) 170; Merzlak v. Barbic, 32 Pittsb. Leg. J. (N. S.) (Pa.) 314; Oplinger v. Oplinger, 9 North. Co. Rep. (Pa.) 316; Congdon v. Aylsworth, 16 R. I. 281, 18 Atl. 247; Davies v. Davies, 1 Jur. 446, 2 Keen 534, 14 Eng. Ch. 534, 48 Eng. Reprint 733.

[97] Shoemaker v. Smith, 74 Ind. 71; Miller v. Rapp, 135 Ind. 614, 34 N. E. 981, 35 N. E. 693; Helmer v. Yetzer, 92 Iowa 627, 61 N. W. 206; Inglis v. Floyd, 33 Mo. App. 565; Rodgers v. Clement, 162 N. Y. 422, 56 N. E. 901, 76 Am. St. 342; Heartt v. Corning, 3 Paige (N. Y.) 566; Petrakion v. Arbelly, 23 N. Y. Civ. Proc. 183, 26 N. Y. S. 731; Smith v. Underhill, 19 N. Y. S. 249; Eaton v. Eaton, 43 N. Car. 102; Mills v. Carrier, 30 S. Car. 617, 9 S. E. 350, 741; Jacobs v. Goodman, 2 Cox Ch. 282, 30 Eng. Reprint 130.

[98] Clinton v. Winnard, 135 Ill. App. 274; Corcoran v. Sumption, 79 Minn. 108, 81 N. W. 761, 79 Am. St. 428; Scott v. Lalor, 18 N. J. Eq. 301.

[99] House v. John Linn, 179 Ill. App. 114.

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validity of a complaint. It was said in an Indiana case:[1] "It is further insisted that the cross-complaint is bad, for the reason that it seeks to recover a sum certain, a balance due against the other partners, and does not allege that the debts of the firm are paid and the amounts due the firm collected. * * * It is not a demand for an amount due. It is, like the complaint itself, a demand for accounting and for the payment to each party of whatever balance should be found due. 'One partner may maintain an action to compel an accounting and to recover such sum as may be found due him upon the final adjustment of the partnership affairs.'[2] This is not such a case as that of Lang v. Oppenheim.[3] That was a suit brought by one partner to recover from another for an amount unadjusted due out of copartnership assets. The suit in that case could not lie, since the amount claimed might be needed to pay creditors, whose rights are superior to the rights of partners. In the case at bar there is, on the contrary, a simple demand for an accounting and for the payment of whatever may be found due to each partner. The circumstance that the cross-complaint concludes with a demand for five thousand dollars does not of itself change a complaint for an accounting into a mere demand for money due. We think the cross-complaint stated a good cause of action for an accounting between the partners, and for the payment to each of whatever sum should be found due him." An answer to a bill for dissolution of a copartnership which claims a larger share than the bill admits, has been held a cross-bill, to which a special reply may be filed.[4] As said in one case:[5] "A cross-complaint, to withstand a demurrer for want of facts, must, like any other, state facts sufficient to constitute a cause of action.[6] The only facts averred in the cross-complaint are that the parties are partners; that the firm owns a large stock of goods; that it is largely indebted; that each has put in a part of the capital, and each has taken out

[1] Miller v. Rapp, 135 Ind. 614, 34 N. E. 981, 35 N. E. 693.

[2] Citing Meredith v. Ewing, 85 Ind. 410.

[3] Lang v. Oppenheim, 96 Ind. 47.

[4] Demain v. Huston, 70 W. Va. 306, 73 S. E. 923.

[5] Shoemaker v. Smith, 74 Ind. 71.

[6] Citing Ewing v. Patterson, 35 Ind. 326.

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a part; that, without the fault of the appellee, the firm has not done, and is not doing, a profitable business, and that the facts respecting its business require a dissolution. These facts did not entitle the appellee to any relief. There is no averment as to the contract by which the firm was formed, the time it was to exist, or the method of its dissolution. It is not averred that the appellant has violated his contract; that the firm, or either member of it, is not abundantly able to pay its liabilities, or that the appellant is not willing to dissolve the firm, pay the debts and divide the assets. In short, nothing is really averred, except that the firm is in debt, and is not making money. These facts furnish no ground for relief."

§ 857. Extent of defense.—It is stated by Mr. Bates, in his work on Partnership, that "a defense by one partner which goes to the whole cause of action, will inure to all the partners."[7] The reason is plain. In the first place, if the action is brought upon partnership liability, the defense of the partner appearing is a defense to the whole partnership and each member of it, and the claim must fail. In the second place, if the decision should be given in favor of the defending partner alone, and against the other partner, the partner in whose favor the decision was given would still be liable, upon his co-partner's right to contribution. The rule holds in most jurisdictions, "that a complaint which does not state a good cause of action as to all, though it does as to some of the plaintiffs, is bad as to all, for want of sufficient facts to constitute a cause of action."[8] A set-off or counterclaim against an individual partner is not a defense to a partnership cause of action.[9] As held in an Illinois case:[10] "The general rule is, that a bank has a right of set-off, as against a deposit, only when the individual who is both

[7] Bates Partnership, § 1071.

[8] McIntosh v. Zaring, 150 Ind. 301, 49 N. E. 164.

[9] Smith v. Brannon, 21 Ky. L. 267, 51 S. W. 178; DeForest v. Andrews, 27 Misc. 145, 29 Civ. Proc. R. 250, 58 N. Y. S. 358; Pope Mfg. Co. v. Charleston Cycle Co., 55 S. Car. 528, 33 S. E. 787; Hunter v. Hubbard, 26 Tex. 537; Grier v. Strother, 153 Mo. App. 292, 133 S. W. 404.

[10] International Bank v. Jones, 119 Ill. 407, 9 N. E. 885, 59 Am. Rep. 807.

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depositor and debtor stands, in both these characters alike, in precisely the same relation and on precisely the same footing toward the bank, and hence an individual deposit can not be set off against a partnership debt." Nonexistence of a partnership obligation may be pleaded in defense;[11] also that one partner was not a partner nor liable as a partner when the obligation sued on was created.[12] In order to plead a good defense of lack of authority in the partner who executed the obligation, it must appear that such partner had neither express nor implied authority, that his act had not been adopted or ratified and that the plaintiff at the time knew, actually or constructively, of his want of authority.[13]

§ 858. **Defenses in suits between partners.**—In suits for an accounting, inter sese, all matters between the partners which would ordinarily be part of the account between them will be taken into consideration, even when not set up in pleadings by the defendant.[14] Were this not the fact, there could be no accounting unless the defendant partner should file his cross-petition. The very nature of accounting implies an account on both sides, so far as possible, and if the whole case, even if submitted upon the petition of the plaintiff, should show an amount

[11] Cain Lumber Co. v. Standard Dry Kiln Co., 108 Ala. 346, 18 So. 882; Buck v. Smith, 2 Colo. 500; Fox v. Clemmons, 30 Ky. L. 805, 99 S. W. 641.

[12] New York &c. Contracting Co. v. Meyer, 51 Ala. 325; Fowlkes v. Baldwin, 2 Ala. 705; Holman v. Carhart, 25 Ga. 608; Rochester v. Trotters, 4 Bibb. (Ky.) 444; Martien v. Manheim, 80 Pa. St. 478; Persons v. Frost, 25 Tex. Suppl. 129; Harvey v. Mowat, 2 Quebec Pr. 212.

[13] Manville v. Parks, 7 Colo. 128, 2 Pac. 212; King v. Mecklenburg, 17 Colo. App. 312, 68 Pac. 984; McCord Co. v. Callaway, 109 Ga. 796, 35 S. E. 171; Griffin v. Colonial Bank, 7 Ga. App. 126, 66 S. E. 382; Dorn v. Tyler, 64 Ill. App. 110; Moffitt v. Roche, 92 Ind. 96; Fennell v. Myers, 76 S. W. 136, 25 Ky. L. 589; Vienne v. Harris, 14 La. Ann. 382; Kendall v. Carland, 5 Cush. (Mass.) 74; Irvine v. Myers, 4 Minn. 229; Bates v. Scheik, 47 Mo. App. 642; Tilli v. Vandegrift, 18 Pa. Super. Ct. 485; Potter v. Price, 3 Pittsb. (Pa.) 136; Ellston v. Deacon, L. R. 2 C. P. 20; Leverson v. Lane, 13 C. B. (N. S.) 278, 32 L. J. C. P. 10, 9 Jur. (N. S.) 670, 7 L. T. 326, 11 W. R. 74; Pitfield v. Trotter, 32 Nova Scotia 125; Moore v. Gurney, 21 U. C. Q. B. 127.

[14] Story Equity Pleading, § 392a.

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due defendant, then the defendant would necessarily be entitled to a decision, regardless of whether the balance was shown by his cross-petition or not.[15] In fact, such an action often results in a receivership, with the duty on the receiver to settle up the affairs of the firm as he finds them. In such a case, where the statutes make provision for proving claims, this method should be followed, although this is not ordinarily by answer or other pleading, but simply by an affidavit filed with the receiver.

§ 859. Reply.—The reply, in partnership as in other cases, should be filed to controvert any material matters set up affirmatively in the answer, and should be so drawn as to fully cover and deny such allegations. For example, we have seen heretofore that a partner, withdrawing from the firm, and without leaving his name in the firm name, is not liable for after-acquired indebtedness, unless the creditor had known of his former connection with the firm, and had no notice, actual or constructive, of the withdrawal. Hence, it is held[16] that where such a defendant denies that he was a partner, it is essential in replying to aver that plaintiff had known defendant was a partner before placing the note sued upon, and it is not sufficient to allege that defendant was a partner prior to the date of the note, and that plaintiff had no notice of his retirement or of a dissolution. The knowledge of plaintiff of defendant's connection is essential. A reply of ratification to an answer of execution without authority is not good unless it alleges knowledge of the act which was ratified.[17] Where there is an answer that a debt sued on was

[15] Saunders v. Wood, 15 Ark. 24; Craig v. Chandler, 6 Colo. 543; Atkinson v. Cash, 79 Ill. 53; Acme Copying Co. v McLure, 41 Ill. App. 397; Quinn v. McMahan, 40 Ill. App. 593; Helmer v. Yetzer, 92 Iowa 627, 61 N. W. 206; Little v. Merrill, 62 Maine 328; Felder v. Wall, 26 Miss. 595; Johnson v. Buttler, 31 N. J. Eq. 35; Campbell v. Zabriskie, 8 N. J. Eq. 738; White v. Reed, 124 N. Y. 468, 26 N. E. 1037; Cook v. Jenkins, 79 N. Y. 575; Scott v. Pinkerton, 3 Edw. (N. Y.) 70; Boyd v. Foot, 5 Bosw. (N. Y.) 110; Reeves v. Bushby, 25 Misc. 226, 55 N. Y. S. 70; Congdon v. Aylsworth, 16 R. I. 281, 18 Atl. 247; Allen v. Allen, 11 Heisk. (Tenn.) 387.

[16] Warren v. Ball, 37 Ill. 76.

[17] Finney v. Erie City Iron Works, 109 Ala. 485, 20 So. 48.

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that of an individual partner, the issue of assumption of such debt by the firm should be raised by reply.[18] A reply in general denial controverts all material allegations of the answer. As said in one case:[19] "The general denial controverted the truth of the matters averred in the answer. Under the general denial, the appellee was entitled to disprove whatever the appellants were required by the answer to prove, and as they were required to prove the conversion of partnership funds to the private use of the appellee, it was competent for him, under the general denial, to disprove a conversion, to show that he had applied such funds to partnership purposes."

§ 860. **Departure.**—There must be no departure in the reply from the facts stated in the petition. There is a departure, where suit is commenced, the petition alleging an action for money loaned defendants, the answer stating that the loan was to a corporation in which defendants were stockholders, and the reply setting up that, on account of false annual reports and unlawful organization, the defendants became, by statute, individually liable to the amount of their stock on a partnership liability.[20] It has, however, been held that when a defendant is sued as a partner, and denies the fact of partnership, there is no departure by reason of a reply setting up estoppel by representation of defendant to plaintiff.[21] In short, there is a departure whenever the reply brings in matters inconsistent with the facts alleged in the petition, and the reason for not allowing the departure is plain. It would be impossible to intelligently proceed in the case, where the petition set up one set of facts and the reply set up another set inconsistent with those first alleged. If proper at all to set up the inconsistent facts, it could only be done by amending the petition. There must be some definite issue established by the pleadings. Simply stating facts, however, in the reply, which are not necessarily inconsistent with

[18] Fordice v. Scribner, 108 Ind. 85, 9 N. E. 122.

[19] Hackney v. Williams, 46 Ind. 413.

[20] Salt Lake &c. Bank v. Hendrickson, 40 N. J. L. 52.

[21] Rainsford v. Massengale, 5 Wyo. 1, 35 Pac. 774.

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the petition but which are not included therein, and in reply to the facts alleged in the answer, is not a departure. The term "departure" is in fact self-explanatory, as used in a nontechnical sense.

§ 861. Proof and variance.—Whenever the existence of a partnership is made a necessary issue by the pleadings of either plaintiffs or defendants the party who alleged its existence has the burden of proving it.[22] Of course, if the existence of a partnership is not in issue, it is unnecessary to prove it.[23] In actions

[22] Tibbs v. Parrott, 1 Cranch (C. C.) 313, Fed. Cas. No. 14023; Nicholson v. Patton, 2 Cranch (C. C.) 164, Fed. Cas. No. 10250; Findlay v. Stevenson, 3 Stew. (Ala.) 48; Vaughan v. McGannon, 52 Ark. 244, 12 S. W. 557; Trowbridge v. Sanger, 4 Ark. 179; Alford v. Thompson, 5 Ark. 347; Carlton v. Grissom, 98 Ga. 118, 26 S. E. 77; Powell Co. v. Finn, 198 Ill. 567, 64 N. E. 1036; Smith v. Hulett, 65 Ill. 495; Yocum v. Benson, 45 Ill. 435; King v. Haines. 23 Ill. 340; Hancock v. Hintrager, 60 Iowa 374, 14 N. W. 725; Byington v. Woodward, 9 Iowa 360; Bernard v. Parvin, Morr. (Iowa) 309; Burnham v. Lutz, 8 Kans. App. 361, 55 Pac. 519; Magee v. Dunbar, 10 La. 546; Head v. Sleeper, 20 Maine 314; Lighthiser v. Allison, 100 Md. 103, 59 Atl. 182; Haskins v. D'Este, 133 Mass. 356; Gray v. Gibson, 6 Mich. 300; Whitney v. Reese, 11 Minn. 138; Fetz v. Clark, 7 Minn. 217; Stickney v. Smith, 5 Minn. 486; Irvine v. Myers, 4 Minn. 229; Bank of Commerce v. Selden, 1 Minn. 340; Smith v. Cromer, 66 Miss. 157, 5 So. 619; Lessing v. Sulzbacher, 35 Mo. 445; Oil Well Supply Co. v. Metcalf, 174 Mo. App. 555, 160 S. W. 897; Clark v. Kensell, Wright (Ohio) 480; Johnson v. J. J. Douglass Co., 8 Okla. 594, 58 Pac. 743; Hoyt v. Kountze, 54 Nebr. 368, 74 N. W. 585; Follmer v. Frommel, 63 Hun 370, 18 N. Y. S. 318, 44 N. Y. St. 353; Wildrick v. Heyshem, 96 App. Div. 515, 89 N. Y. S. 78; Halliday v. McDougall, 22 Wend. (N. Y.) 264; Hughes v. Moles, 3 Lack. Jur. (Pa.) 382; Bonnet v. Tips Hardware Co. (Tex. Civ. App.), 59 S. W. 59; Baptist Book Concern v. Carswell (Tex. Civ. App.), 46 S. W. 858.

[23] McGill v. Dowdle, 33 Ark. 311; Hicks v. Branton, 21 Ark. 186; Marx v. Culpepper, 40 Fla. 322, 24 So. 59; Wright v. Curtis, 27 Ill. 514; Howard v. Woodward, 52 Kans. 106, 34 Pac. 348; Derbigny v. Mondelli, 15 La. 496; Head v. Goodwin, 37 Maine 181; Naftzker v. Lautz, 137 Mich. 441, 100 N. W. 601; Philpott v. Bechtel, 104 Mich. 79, 62 N. W. 174; Dobson v. Hallowell, 53 Minn. 98, 54 N. W. 939; Derby v. Gallup, 5 Minn. 119; Jennings v. Russell, 47 Mo. App. 160; Graves v. Norfolk Nat. Bank, 49 Nebr. 437, 68 N. W. 612; Win v. Devine. 62 N. J. L. 374, 41 Atl. 213; Waldo v. Beckwith, 1 N. Mex. 97; Reed v. McConnell, 133 N. Y. 425, 31 N. E. 22; Millerd v. Thorn, 56 N. Y. 402, 15 Abb. Prac. (N. S.) 371; Porter v. Cumings, 7 Wend. (N. Y.) 172; Mack v. Spencer, 4 Wend. (N. Y.) 411; Hall v. Younts, 87 N. Car. 285; Palin v. Small, 63 N. Car. 484;

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by or against surviving partners as in other actions, the burden of proof to sustain an issue is on the person who raises such issue in his pleading.[24] Material variance between proof offered by a party and the allegations of the pleadings is, as in all other suits of whatsoever nature fatal to the cause of action or defense, in actions brought by or against partnerships;[25] by surviving part-

Wallace v. Baisley, 22 Ore. 572, 30 Pac. 432; Tams v. Hitner, 9 Pa. St. 441; Bott v. Stoner, 2 Penny. (Pa.) 154; Ege v. Kyle, 2 Watts (Pa.) 222; Deadwood First Nat. Bank v. Hattenbach, 13 S. Dak. 365, 83 N. W. 421; Sanger v. Corsicana Nat. Bank (Tex. Civ. App.), 87 S. W. 737; Bass v. Clive, 4 Campb. 78, 4 M. & S. 13; Rordasnz v. Leach, 1 Stark. 446, 2 E. C. L. 172.

[24] Brown v. Farnham, 58 Minn. 499, 60 N. W. 344; Baughan v. Graham, 1 How. (Miss.) 220; Ledden v. Colby, 14 N. H. 33, 40 Am. Dec. 173; Fogarty v. Cullen, 49 N. Y. Super. Ct. 397. See Stahle v. Poth, 220 Pa. 335, 69 Atl. 864.

[25] Barry v. Foyles, 1 Pet. (U. S.). 311, 7 L. ed. 157; Schiffer v. Anderson, 146 Fed. 457, 76 C. C. A. 667; Carrington v. Ford, 4 Cranch C. C. 231, Fed. Cas. No. 2449; Coffee v. Eastland, Fed. Cas. No. 2945, Brunn. Sel. Cas. 216, Cooke (Tenn.) 159; Darst v. Roth, 4 Wash. C. C. 471, Fed. Cas. No. 3582; Warner-Smiley Co. v. Cooper, 131 Ala. 297, 31 So. 28; McMillan v. Otis, 74 Ala. 560; Wharton v. King, 69 Ala. 365; Flake v. Day, 22 Ala. 132; Scott v. Dansby, 12 Ala. 714; Kilgore v. Shannon, 6 Ala. App. 537, 60 So. 520; Carstens v. Frye-Bruhn &c. Co., 1 Alaska 140; Glausier v. Boston Naval Stores Co., 132 Ga. 549, 64 S. E. 547; Price v. Bell, 88 Ga. 740, 15 S. E. 810; Champion v. Wilson, 64 Ga. 184; Woodworth v. Fuller, 24 Ill. 109; Hurd v. Culies, 18 Ill. 188; Lucas v. Lamont, 190 Ill. App. 47; Dale v. Keefe, 178 Ill. App. 262; Maiden v. Webster, 30 Ind. 317; Richards v. Hellen, 153 Iowa 66, 133 N. W. 393; Hambro Distilling &c. Co. v. Price, 141 Iowa 169, 119 N. W. 541; Padden v. Clark, 124 Iowa 94, 99 N. W. 152; Byington v. Woodward, 9 Iowa 360; Crane v. Ring, 48 Kans. 61, 29 Pac. 696; Waits v. McClure, 10 Bush (Ky.) 763; Schroeder v. Turner, 68 Md. 506, 13 Atl. 331; Whiting v. Withington, 3 Cush. (Mass.) 413; Stix v. Mathews, 63 Mo. 371; Schmidt v. Schmaelter, 45 Mo. 502; Rippey v. Evans. 22 Mo. 157; Hoyt v. Reed, 16 Mo. 294; Vanhoosier v. Dunlap, 117 Mo. App. 529, 93 S. W. 350; American Bank v. Campbell, 34 Mo. App. 45; Wilson v. Yegen, 38 Mont. 504, 100 Pac. 613; Cooperstown Bank v. Woods, 28 N. Y. 545; Kayser v. Sichel, 34 Barb. (N. Y.) 84; Pease v. Morgan, 7 Johns. (N. Y.) 468; Manhattan Co. v. Ledyard, 1 Caines (N. Y.) 192; Collier v. Cereal Co., 150 App. Div. 169, 134 N. Y. S. 847; Menzie v. Wolff, 120 N. Y. S. 53; Hohnes v. Daniels, 86 N. Y. S. 19; King v. Timmons, 23 Okla. 407, 100 Pac. 536; Levins v. Stark, 57 Ore. 189, 110 Pac. 980; Sabin v. Michell, 27 Ore. 66, 39 Pac. 635; Spoolcotton Co. v. King, 68 S. Car. 196, 46

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ners;[26] or actions at law between partners.[27] In actions for accounting, the same rules as to the burden of supporting an issue by competent proof,[28] and as to variance between pleading and proof, apply as in other partnership cases.[29] In a suit by partners, on a contract, the defendant did not need to deny the fact of partnership under oath in order to present the question of a variance, where there was evidence that one plaintiff was not a partner when the contract was made and performed.[30] Where an action was brought by two partners, the defendant could show that there were other partners, who had an interest in the suit, and thus defeat the suit for want of parties without denying the fact

S. E. 1005; Fant v. Gadberry, 5 Rich. L. (S. Car.) 10; Ball v. Strohecker, 2 Speers (S. Car.) 364; Cornwall v. McKinney, 12 S. Dak. 118, 80 N. W. 171; Wilson v. Smith, 5 Yerg. (Tenn.) 379; Moore v. Williams, 31 Tex. Civ. App. 287, 72 S. W. 222; Duncan v. Randall, 2 Utah 131; Miner v. Downer, 20 Vt. 461; Fullerton v. Seymour, 5 Vt. 249; Grissom v. Hofius, 39 Wash. 51, 80 Pac. 1002; Cornhauser v. Roberts, 75 Wis. 554, 44 N. W. 744; Whitman v. Wood, 6 Wis. 676; Michael v. Kennedy, 166 Mo. App. 462, 148 S. W. 983; Garza v. Alamo Live Stock &c. Co. (Tex. Civ. App.), 147 S. W. 687; Neal v. Adkins (Tex. Civ. App.), 145 S. W. 264; Story v. Richardson, 6 Bing. N. Cas. 123, 4 Jur. 26; McDonald v. McKeen, 28 Nova Scotia 329; Pegg v. Plank, 3 U. C. C. P. 396; French v. Weir, 17 U. C. Q. B. 245.

[26] Mead v. Raymond, 52 Mich. 14. 17 N. W. 221.

[27] Davis v. Wimberly, 86 Ga. 46, 12 S. E. 208; Tucker v. Page, 69 Ill. 179; Shattuck v. Lawson, 10 Gray (Mass.) 405; Leabo v. Renshaw, 61 Mo. 292; Gay v. Fretwell, 9 Wis. 186; Carfrae v. Vanbuskirk, 1 Grant Ch. (U. C.) 539. See Hartzell v. Murray, 224 Ill. 377, 79 N. E. 674.

[28] Davis v. Wimberley, 86 Ga. 46, 12 S. E. 208; Tucker v. Page, 69 Ill. 179. See also Hartzell v. Murray, 224 Ill. 377, 79 N. E. 674; Shattuck v. Lawson, 10 Gray (Mass.) 405; Leabo v. Renshaw, 61 Mo. 292; Reed v. McConnell, 133 N. Y. 425, 31 N. E. 22; Gay v. Fretwell, 9 Wis. 186; Carfrae v. Vanbuskirk, 1 Grant Ch. (U. C.) 539.

[29] Richards v. Fraser, 122 Cal. 456, 55 Pac. 246; Littlefield v. Beamis, 5 Rob. (La.) 145; Bass v. Taylor, 34 Miss. 342; Mitchell v. O'Neale, 4 Nev. 504; Arnold v. Angell, 62 N. Y. 508; Salter v. Ham, 31 N. Y. 321; Boyd v. Foot, 5 Bosw. (N. Y.) 110; Gaskell v. Nolte, 138 App. Div. 875. 123 N. Y. S. 442; Heye v. Tilford, 2 App. Div. 346, 73 N. Y. St. 428, 37 N. Y. S. 751; Gorman v. Madden, 27 S. Dak. 319, 131 N. W. 290; Illstad v. Anderson, 2 N. Dak. 167, 49 N. W. 659; James v. Browne, 1 Dall. (Pa.) 339, 1 L. ed. 165; Morris v. Wood (Tenn. Ch.), 35 S. W. 1013.

[30] Neal v. Adkins (Tex. Civ. App), 145 S. W. 264.

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of partnership.[31] There was no variance in a suit by a plaintiff individually, which was on a claim in which his firm was interested, according to his testimony, while the defendant answered and testified that the contract was with the plaintiff individually.[32] It has been held that there is no variance where the plaintiff in an action for goods sold alleged that the contract was that of the defendants as partners, but showed in evidence that it was made by them as individuals through an authorized agent.[33] In a replevin suit against a partnership where no personal judgment is sought or rendered, it is immaterial whether a certain person is a partner, and the failure to prove him such will not defeat the plaintiff's right to recover.[34] A joinder of too many persons as defendant partners does not, in some jurisdictions, prevent recovery against the actual partners.[35] In an action for conversion against a partnership, it is insufficient to prove merely a conversion by one partner.[36] Where it is admitted that the defendant is a partnership organized under the laws of Michigan, this does not show whether it was organized under one statute as an association suable in its firm name, or under another statute as a partnership suable in the names of its general partners, and proof as to which statute governs is necessary.[37] A bill for an accounting on the theory of a partnership in the operation of a farm, which prayed an accounting "in respect to said copartnership," as well as for general relief, did not authorize the granting of relief on the theory of a partnership merely in the business of buying and selling stock.[38] A statement in a complaint that a defendant has appropriated from firm funds $3,000, more or less, states only an approximation of the amount appropriated, and does not preclude the court from finding the

[31] Houston &c. R. Co. v. Corsicana Fruit Co. (Tex. Civ. App.), 170 S. W. 849.

[32] Bryant v. Phillips, 189 Mo. App. 278, 176 S. W. 294.

[33] Oil Well Supply Co. v. Metcalf, 174 Mo. App. 555, 160 S. W. 897.

[34] Richards v. Hellen, 153 Iowa 66, 133 N. W. 393.

[35] Alaska Banking & Safe Deposit Co. v. Van Wyck, 146 App. Div. 5, 130 N. Y. S. 563.

[36] Kilgore v. Shannon, 6 Ala. App. 537, 60 So. 520.

[37] Collier v. Postum Cereal Co., 150 App. Div. 169, 134 N. Y. S. 847.

[38] Miller v. Casey, 176 Mich. 221, 142 N. W. 589.

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exact condition of the account.[39] In an action on a partnership dissolution agreement, where defendant pleaded a mutual mistake in transcribing the agreement, and the evidence showed plaintiff knew of the mistake, there was no material variance.[40] In an action for goods sold to a firm, where no exceptions were filed to plaintiff's pleadings, and the counts, though inconsistent to a certain extent, pleaded several combinations of facts sufficient to show defendant's liability, a judgment was not set aside for variance between the pleadings and the proof, where the evidence was sufficient to support the plaintiff's allegation that defendant was estopped to deny the existence of a partnership, and that defendant was carrying on the business under a firm name, of which his own name formed a part.[41] Where a creditor of a firm declares on a note, in which indebtedness, evidenced by an account prior to his receiving notice of a partner's retirement, was merged, he may not recover for the indebtedness incurred prior to the notice, if there is no alternative pleading on the account covering that time.[42] Dismissal as to a partner who was made defendant in an action on behalf of a firm by a partner to recover an alleged unpaid balance due the firm after a fraudulent settlement with two of the partners, terminated the suit as a partnership action, but it was held proper to continue it to determine whatever rights plaintiff might establish though he could only recover his proportionate share of any unpaid balance.[43] Where an answer in an action by one partner against his copartners for an accounting of the affairs of the firm of M. & G., engaged in buying and selling live stock, alleged that during the course of said partnership plaintiff engaged in a business "contrary to the provisions of this said partnership," and also alleged that he "bought and sold live stock as

[39] Brandt v. Salomonson, 17 Cal. App. 395, 119 Pac. 946.

[40] Wait v. McKibben, 92 Kans. 394, 140 Pac. 860.

[41] Garza v. Alamo Live Stock Commission Co. (Tex. Civ. App.), 147 S. W. 687.

[42] Rodgers-Wade Furniture Co. v. Wynn (Tex. Civ. App.), 156 S. W. 340.

[43] Storrie v. Ft. Worth Stockyards Co. (Tex. Civ. App.), 143 S. W. 286.

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such partner," from which he made profits of which he made no accounting to the defendants, the defendants were allowed to show that plaintiff, as representative of the firm of M. & G., under an agreement between the partners thereof that he should do so, engaged in such other business as partner with others; and that the firm of M. & G. was entitled to his share of the profits in such other business.[44]

§ 862. Separate pleading by one partner.—Each of the partners has a right to plead separately from the others.[45] Such pleadings do not bind his copartners or affect them,[46] except where they admit the allegations, or adopt them.[47]

§ 863. Demurrer.—Owing to the fact that in partnership law there are so many matters implied from the fact of partnership, the relations, and consequent liability, may very often be determined by demurrer. For instance, a foreign partnership can not sue, as such, under the statutes of most states, but must sue in the individual names of its members.[48] Hence, a petition, showing the plaintiff to be a foreign partnership, but without the individual partners shown as plaintiffs, is subject to demurrer, as it shows on its face a lack of capacity to sue. If, however, an action is commenced in a name, such as John Smith and Company, it has been held not subject to demurrer for want of legal capacity to sue, inasmuch as at least one plaintiff (John Smith) has such legal capacity.[49] It is not the intention to enter into

[44] Gorman v. Madden, 27 S. Dak. 319, 131 N. W. 290.

[45] Plowman v. Riddle, 7 Ala. 775; Friend v. Duryee, 17 Fla. 111, 35 Am. Rep. 89; Machinists' Bank v. Krum, 15 Iowa 49; Vallandingham v. Duval, 7 J. J. Marsh. (Ky.) 262; Orleans Bank v. Whittemore, 15 La. 276; Allison Bros. Co. v. Hart, 56 Hun 282, 30 N. Y. St. 697, 9 N. Y. S. 692; Ruffner v. Montgomery, 61 W. Va. 62, 56 S. E. 388.

[46] Anderson v. Henshaw, 2 Day (Conn.) 272; Nixon v. Downey, 42 Iowa 78; Orleans Bank v. Whittemore, 15 La. 276; Brandt v. Shepard, 39 Minn. 454, 40 N. W. 521; Corcoran v. Trich, 9 Pa. Cas. 110, 11 Atl. 677.

[47] Consaul v. Sheldon, 35 Nebr. 247, 52 N. W. 1104; Barnett v. Watson, 1 Wash. (Va.) 372.

[48] Brownson v. Metcalfe, 1 Handy (Ohio) 188.

[49] Brookmire v. Rosa, 34 Nebr. 227, 51 N. W. 840.

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a detailed discussion of the question of demurrer here, as it belongs to works on pleading, but only to touch upon the subject as it relates, in general, to partnership law. It is sufficient to say here that whenever, by the ordinary and usual terms of pleading, the facts set forth in the pleading do not, when considered in connection with the law governing them, establish a cause of action or a defense, as the case may be, then a demurrer may be proper.[50] If a person is sued upon a partnership liability and no partnership liability is shown in the pleadings, then a demurrer is proper.[51] A demurrer is proper when the facts pleaded in a complaint by one partner against another show no right of action.[52] A petition which alleges a partnership, that the plaintiff was wrongfully excluded from the business, and asking an accounting, but which does not show the terms or the plaintiff's interest in the business, has been held demurrable.[53]

§ 864. Motion for judgment on the pleadings.—In the event that the pleadings do not show any cause of action against a partnership, a motion for judgment on the pleadings, on the part of the partnership, should be granted. The converse is also true, and if the petition shows partnership liability, and the answer shows no defense thereto, judgment should also be granted on the pleadings. For example, if a firm is sued upon a note, given by one partner on the firm, for his own debt, and the petition shows that the plaintiff knew this, and its fraudulent nature, a motion for judgment on the pleadings should be granted. The practice, however, at least in regard to details, is not the same in all jurisdictions.

§ 865. Summons.—The most important principles as to the service of process and summons were discussed in the chap-

[50] Massey v. Pike, 20 Ark. 92; Fox v. Clemmons, 30 Ky. L. 805, 99 S. W. 64; Thompson v. Young, 90 Md. 72, 44 Atl. 1039; Beacannon v. Liebe, 11 Ore. 443, 5 Pac. 273.

[51] Wood v. Martin, 115 Ga. 147, 41 S. E. 490.

[52] Ridgway v. Grant, 17 Ill. 117; Whitlock v. S. G. Mozley & Co., 142 Ga. 305, 82 S. E. 886; Lane v. Lodge, 139 Ga. 93, 76 S. E. 874; Mackey v. Auer, 8 Hun (N. Y.) 180.

[53] Rose v. Moate (Ga.), 87 S. E. 20.

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ter on Actions, under the heading of Process.[54] In case the suit is against each partner individually, each one, being a separate defendant, must be served with summons. Wherever, by statute, suit may be commenced against the partnership in the firm name, it is usually provided, as, for example, in Ohio, that service may be made by leaving a copy at the usual place of business of the firm, or with any member of the partnership.[55] If the partnership have a usual place of doing business in each of several counties, it may be sued in any of them, but, if sued in the firm name, it must be in a county where it has an actual place of business.[56] Where only one of several co-defendant partners is served before the running of the statute of limitations, this will, it is held, stop the running of the statute against the others, and they may be served at a later time.[57] The service, like service in other classes of cases, may be either actual or constructive, and under the same conditions and limitations. In case there is an amendment to a pleading, substituting the individual partners for the firm name, it is essential that a new summons be served.[58]

§ 866. Verification.—In many states verification of a partnership pleading by one partner, even when required, is held sufficient.[59] A partner is, as has been seen, an agent for the firm in so far as he acts within the scope, or apparent scope of his authority and the firm business. He is, therefore, authorized, in the absence of a contract to the contrary, to verify, in the usual and ordinary course of events, pleadings of the firm. Moreover, in such states as provide by law that where several parties are united in interest, and plead together, one may verify for all; one partner,

[54] See ante § 817.

[55] Rev. Stats. of Ohio, § 5039.

[56] Grady v. Gosline, 48 Ohio 665, 29 N. E. 768.

[57] Cowie v. Meyers, 10 Ohio Dec. 91.

[58] Dobell v. Loker, 1 Handy (Ohio) 574, 12 Ohio Dec. 297.

[59] Garner v. Simpson, Minor (Ala.) 67; Lessem v. Wilson, 43 Iowa 488; Mooney v. Ryerson, 8 N. Y. Civ. Proc. 435; Lacy v. Wilkinson, 7 N. Y. Civ. Proc. 104; Martinez v. Cordoba, 5 Philippine 545; Cheatham v. Pearce, 89 Tenn. 668, 15 S. W. 1080; Moody v. Alter, 12 Heisk. (Tenn.) 142; Garland v. Hickey, 75 Wis. 178, 43 N. W. 832.

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where several are so joined, may make the affidavit for all.[60] In case, however, their interests are not united, and where they do not plead together, each must sign his own affidavit, the same as if they were nonpartners.

[60] See Ohio Rev. Stats., § 51021.

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CHAPTER XXVII

EVIDENCE

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§ 875. Evidence—Generally.—Reference should be made to the definitions of partnership;[1] to the tests of partnership;[2] to the law as to the power of one partner to bind the firm;[3] and to the rules of partnership accounting,[4] for the purpose of making more intelligent and comprehensible the law as to proof in establishing the rights and liabilities of the persons composing the partnership among themselves or as between such partnership and third persons, since in almost all cases the rules as to the admissibility of evidence and the amount required are closely dependent upon the substantive law.

§ 876. Burden of proof.—In an action on a contract purporting to have been executed in a firm's name, or in an action against alleged partners on an account or on an implied agreement, the burden of proof is upon the plaintiff to show that the persons sued as partners were in fact such; and the proof must establish that such persons were partners at the time the contract was executed or the account made.[5] In some jurisdictions

[1] Ante Chapter 2.
[2] Ante Chapter 3.
[3] Ante Chapter 15.
[4] Ante Chapters 21, 23.
[5] See Guice v. Thornton, 76 Ala. 466; Smith v. Moynihan, 44 Cal. 53; Kent v. Cobb, 24 Colo. App. 264, 133 Pac. 424; Rick v. Neitzy, 1 Mackey (D. C.) 21; Davidson v. Wilson, 3 Del. Ch. 307; Cowart v. Fender, 137 Ga. 586, 73 S. E. 822, Ann. Cas. 1913 A, 932n; Smith v. Knight, 71 Ill. 148, 22 Am. Rep. 94; De St. Aubin v. Laskin, 74 Ill. App. 455; Henshaw v. Root, 60 Ind. 220; Graham v. Henderson, 35 Ind. 195; Miller v. Baker, 161 Iowa 136, 140 N. W. 407; Hall v. Clagett, 48 Md. 223; Howe v. Thayer, 17 Pick. (Mass.) 91; Campbell v. Sherman, 49 Mich. 534, 14 N. W. 484; Watts v. Pierson, 170 Mo. App. 532, 156 S. W.

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the burden is not on the plaintiff who asserts liability of the defendants as partners, to prove the fact of partnership unless it is denied;[6] or in some states, denied by verified plea;[7] and if not so denied, the burden is then on the defendants to disprove its existence, or, in some jurisdictions, the failure to file such a plea may operate as a conclusive admission.[8] If a replevin petition charges a partnership, and there is no such denial as required by statute the plaintiff need not prove a particular person to be a member of the firm.[9] Where, in a suit against an alleged partnership, one defendant answered that he could not admit or deny the allegations of the petition for want of sufficient information, and the other denied the indebtedness and pleaded no partnership, the plaintiff had, as against the latter defendant, the burden of proving both the debt and the partnership, and it was error to charge that the only issue was one of partnership.[10] So where the plaintiff declared against a defendant individually, but sought to charge him as a partner, the burden was held to be upon the plaintiff to show the partnership; but it has been held that when the evidence prima facie establishes the partnership, or when it is such that a partnership may reasonably be inferred, the burden is cast upon the defendant to show an incorporation where it was sought to avoid individual liability on the ground that the company was incorporated, and a prima facie case of partnership was held to be made out where the proof shows that the defendant, sought to be charged, represented that the company was composed of himself and two others, and that it was solvent, but without any admis-

724; Walgamood v. Randolph, 22 Nebr. 493, 35 N. W. 217; Oglesby v. Thompson, 59 Ohio St. 60, 51 N. E. 878; Ashley v. Williams, 17 Ore. 441, 21 Pac. 556; Hallstead v. Coleman, 143 Pa. St. 352, 22 Atl. 977, 13 L. R. A. 370; State v. Penman, 2 Desaus. (S. Car.) 1; Maupin v. Daniel, 3 Tenn. Ch. 223; Slater v. Arnett, 81 Va. 432.

[6] Bredhoff v. Lepman, 181 Ill. App. 247.

[7] Thompson v. Piot, 52 Pa. Super. Ct. 305. See ante §§ 847, 848.

[8] Bredhoff v. Lepman, 181 Ill. App. 247. See ante §§ 847, 848.

[9] Richards v. Hellen, 153 Iowa 66, 133 N. W. 393.

[10] American Cotton College v. Atlanta Newspaper Union, 138 Ga. App. 147, 74 S. E. 1084.

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sion or intimation that it was a corporation.[11] A check executed in the firm's name, admitted without proof of execution, was held sufficient evidence of partnership, as the rule is that the existence of partnership may be inferred from indirect evidence.[12] So, the rule is that a firm's liability is presumed where the note or contract is executed in the partnership name and the burden is not on the plaintiff or holder to show affirmatively that it was given as a partnership transaction.[13] But where the execution of such note or contract is denied under oath, the burden is on the plaintiff to prove not only the execution of the instrument, but the authority to execute it as a partnership instrument.[14] Where the action is between partners, as for accounting or dissolution, the burden is on the plaintiff to prove the existence of a partnership, and this, it has been held, requires stronger proof than where an action is brought against parties as partners, and clear and positive evidence.[15] In an action against a surviving partner on a firm debt a prima facie case of partnership must be made out.[16] In a proceeding to establish a wife's interest as her husband's partner, the plaintiff must show the existence of the partnership at the time of the wife's death.[17] Where one partner seeks to recover against another it has been held that the existence of the partnership must be proved with legal certainty.[18] Where partners are sued in their individual name, the fact of the part-

[11] Clark v. Jones, 87 Ala. 474, 6 So. 362; Cook v. Martin, 5 Sm. & M. (Miss.) 379.

[12] Henshaw v. Root, 60 Ind. 220; Byington v. Woodward, 9 Iowa 360.

[13] Knapp v. McBride, 7 Ala. 19; Ensminger v. Marvin, 5 Blackf. (Ind.) 210; Byington v. Woodward, 9 Iowa 360; McMullan v. McKenzie, 2 Greene (Iowa) 368; Barrett v. Swann, 17 Maine 180; Waldo Bank v. Greely, 16 Maine 419; Whitaker v. Brown, 16 Wend. (N. Y.) 505; Vallett v. Parker, 6 Wend. (N. Y.) 615; Doty v. Bates, 11 Johns. (N. Y.) 544.

[14] Hobson v. Porter, 2 Colo. 28; De St. Aubin v. Laskin, 74 Ill. App. 455; Byington v. Woodward, 9 Iowa 360.

[15] Bettinger v. Bettinger (Iowa), 150 N. W. 1025; Chapin v. Cherry, 243 Mo. 375, 147 S. W. 1084; Simpson v. Gernandt (Nebr.), 152 N. W. 549.

[16] Letson v. Hall, 1 Ala. App. 619, 55 So. 944.

[17] Watson v. Hamilton, 180 Ala. 3, 60 So. 63.

[18] Maunsell v. Willett, 36 La. Ann. 322.

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nership and not of the firm's name is the material allegation to be proved; and it was held sufficient to prove the partnership whether the firm name was proved or not.[19]

§ 877. Proof of partnership—Generally.—Courts and law writers recognize the fact that no absolute rule can be given either as to the quantum or kind of proof sufficient to establish the relation of partnership among the persons sought to be charged. It is apparent that the proof must be sufficient to bring the parties within the comprehension of the definitions previously given. That is, the evidence must be sufficient to show some arrangement or agreement between the persons sought to be charged as partners to contribute money, goods, skill or labor to some business enterprise or venture, to the end that the profits derived therefrom may be divided between them; or generally an agreement to the effect that they share in the profits and losses. But it may be sufficient, as will be seen, to prove that one of the persons sought to be charged shall have permitted the others to use his credit or to hold him out as jointly answerable with themselves. The question as to what constitutes a partnership is one of law, but whether or not it exists is a question of fact to be determined from the evidence. To establish the fact of partnership as between themselves much stricter proof is usually said to be required than in cases between partners and third persons. One reason for this is that it is within the power of the partners to give stronger evidence on the subject of the partnership than a third person could ordinarily produce.[20] The rule has been stated thus: "The fact of the existence or nonexistence of a partnership as between themselves must be gathered from the intention of the parties, and the court in arriving at the intention must form its conclusions from deductions drawn by analogy from principles of law applied to the facts and circumstances developed in the case."[21] It has been held that partner-

[19] Stickney v. Smith, 5 Minn. 486.

[20] Chisholm v. Cowles, 42 Ala. 179; Robinson v. Green, 5 Harr. (Del.) 115; Walker v. Matthews, 58 Ill. 196; McGregor v. Cleveland, 5 Wend. (N. Y.) 475.

[21] Heise v. Barth, 40 Md. 259; Bull v. Schuberth, 2 Md. 38; Gray v. Gibson, 6 Mich. 300.

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ship is a fact which may be proved as any other fact by persons having knowledge thereof.[23]

§ 878. Presumptions as to partnership matters.—Presumptions also arise out of methods of partnership dealings. Thus, each partner is presumed to have knowledge of the partnership books, and the books are presumed to be correct. Of course, this presumption is disputable and may be rebutted by proof that the partner had no actual knowledge or opportunity to inspect or examine the books.[23] In the absence of evidence to the contrary it has been presumed that partners are equally interested in the capital and in the profits of the business.[24] And it has been held that they are also presumed to be equally liable to the payment of losses in the same proportion that they are entitled to share the profits.[25] As a general rule, and in the absence of any indications to the contrary, the law presumes that certain existing facts remain the same until proven to have changed. The rule as to the existence of a partnership relation follows the general rule, and if a partnership is shown to have existed, a presumption arises that it continues[26] until a dissolution is shown, and that it so continues under the same terms and conditions.[27] The majority of the cases where the above rule

[22] St. Louis &c. Co. v. McPeters, 124 Ala. 451, 27 So. 518; Central R. &c. Co. v. Smith, 76 Ala. 572, 52 Am. Rep. 353; McGrew v. Walker, 17 Ala. 824; Lockridge v. Wilson, 7 Mo. 560; McGregor v. Cleveland, 5 Wend. (N. Y.) 475.

[23] United States Bank v. Binney, 5 Mason (U. S.) 176; Wheatley v. Wheeler, 34 Md. 62; Shoemaker Piano Mfg. Co. v. Bernard, 2 Lea Tenn.) 358; Layton v. Hall, 25 Tex. 204; Saunders v. Duval, 19 Tex. 467. See also Fairchild v. Fairchild, 64 N. Y. 471; Allen v. Coit, 6 Hill (N. Y.) 318; Pond v. Clark, 24 Conn. 370; Stuart v. McKichan, 74 Ill. 122.

[24] Brewer v. Browne, 68 Ala. 210; Turnipseed v. Goodwin, 9 Ala. 372; Farr v. Johnson, 25 Ill. 522; Moore v. Bare, 11 Iowa 198; Harris v. Carter, 147 Mass. 313, 17 N. E. 469; Gould v. Gould, 6 Wend. (N. Y.) 263; Logan v. Dixon, 73 Wis. 533, 41 N. W. 713; Farrar v. Beswick, 1 Moo. & Rob. 527.

[25] Irvine & Muir Lumber Co. v. Holmes, 26 Cal. App. 453, 147 Pac. 229; Robinson's Executors Case, 2 DeGex, M. & G. 517.

[26] Butler v. Henry, 48 Ark. 551, 3 S. W. 878; Irby v. Brigham, 9 Humph. (Tenn.) 750; Mann v. Clapp, 1 White & W. Civ. Cas. Ct. App. (Tex.), § 502.

[27] Reybold v. Dodd, 1 Harr. (Del.) 401.

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is recognized are based upon proof of partnership within a few months, or at most, a few years before the time in question, and it is doubted that the rule generally applies unless the time intervening is a reasonable time. At least the weight of the presumption would be lessened after a long and unreasonable period of time, and it would be offset by a small amount of evidence to the contrary. It has been held that proof of existence after the execution of a partnership instrument is not proof of existence at the time of execution.[28] It has been held that a presumption of partnership arises from the use of a name such as is commonly employed when a partnership exists,[29] but there are many other cases holding that there is no presumption of partnership from the mere use of a firm name.[30] Where several persons carry on the same business together they may be presumed to be partners,[31] and certainly where they participate in the profits of the business a partnership will be presumed.[32] Each partner has the right to sign the firm name to commercial paper, and it will be presumed, when the firm name so appears, that it was signed by one with authority to do so and for the purposes of the firm; and the burden of proof is on the partners to show the contrary.[33] But proof that the instrument was given in other than a partnership

[28] Byington v. Woodward, 9 Iowa 360.

[29] Bell v. Massey, 14 La. Ann. 831; Cobb v. Martin, 32 Okla. 588, 123 Pac. 422. See also Haug v. Haug, 90 Ill. App. 604, and Mary v. Lampre, 6 Rob. (La.) 314.

[30] Clark v. Jones, 87 Ala. 474, 6 So. 362; Willey v. Crocker-Woolworth Nat. Bank, 141 Cal. 508, 75 Pac. 106; Robinson v. Magarity, 28 Ill. 423; Byington v. Woodward, 9 Iowa 360; Munton v. Rutherford, 121 Mich. 418, 80 N. W. 112; Brennan v. Partridge, 67 Mich. 449, 35 N. W. 85.

[31] McMullan v. Mackenzie, 2 Greene (Iowa) 368.

[32] Meehan v. Valentine, 145 U. S. 611, 12 Sup. Ct. 972, 36 L. ed. 835; Miller v. O'Boyle, 89 Fed. 140; Parker v. Canfield, 37 Conn. 250, 9 Am. Rep. 317; Miller v. Rapp, 135 Ind. 614, 34 N. E. 981, 35 N. E. 693; Ryder v. Wilcox, 103 Mass. 24; St. Louis Bank v. Altheimer, 91 Mo. 190; Mifflin v. Smith, 17 Serg. & R. (Pa.) 165; Cothran v. Marmaduke, 60 Tex. 370.

[33] Le Roy v. Johnson, 2 Pet. (U. S.) 186, 7 L. ed. 391; Jones v. Rives, 3 Ala. 11, 13; Miller v. Hines, 15 Ga. 197; Gregg v. Fisher, 3 Ill. App. 261; Magill v. Merrie, 5 B. Mon. (Ky.) 168; Waldo Bank v. Greely, 16 Maine 419; Thurston v. Lloyd, 4 Md. 283; Manufacturers' &c. Bank v. Winship, 5 Pick. (Mass.) 11, 16 Am. Dec. 369; Littell v. Fitch, 11 Mich. 525; Vallett v. Parker, 6 Wend. (N. Y.) 615.

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transaction will rebut the presumption.[34] It has often been stated that participation in the profits of a business raises a presumption of the existence of a partnership.[35] But this presumption is overcome by proof of the real contract and the circumstances of the case.[36] No presumption of partnership arises from mere joint ownership.[37] A mere joint purchase of real estate in the names of a bankrupt and another, with no proof that either could sell it without the consent of the other, and no evidence of any business done in a firm name, will not establish a partnership.[38] Community of interest in the joint ownership of property is not necessarily evidence of partnership and where a community of interest is held by members of a social or fraternal organization, the presumption is against the existence of a partnership.[39]

§ 879. A mixed question of law and fact.—The question as to the existence of partnership relations is a mixed question of law and of fact. What constitutes a partnership is a question of law, and must be decided by the court. The existence or nonexistence of the facts necessary to bring the relation within the rule of partnership so determined, is a question of fact for the jury to determine.[40] Upon an admitted statement of facts, it is then simply a question of law, and the court will determine whether or not the facts so admitted bring the relation within

[34] N. Y. &c. Ins. Co. v. Bennett, 5 Conn. 574, 13 Am. Dec. 109; Lucas v. Baldwin, 97 Ind. 471; Eastman v. Cooper, 15 Pick. (Mass.) 276, 26 Am. Dec. 600; Butler v. Stocking, 8 N. Y. 408, Seld. notes 123.

[35] Berry v. Pelneault, 188 Mass. 413, 74 N. E. 917; Fourth Nat. Bank v. Altheimer, 91 Mo. 190, 3 S. W. 858; Willoughby v. Hildreth, 182 Mo. App. 80, 167 S. W. 639; Tamblyn v. Scott, 111 Mo. App. 46, 85 S. W. 918.

[36] Bluefields S. S. Co. v. Lala Ferreras Cangelosi S. S. Co., 133 La. 424, 63 So. 96; Ellis v. Brand, 176 Mo. App. 383, 158 S. W. 705; Aehle v. Brand, 176 Mo. App. 395, 158 S. W. 709.

[37] St. John v. Coates, 63 Hun 460, 18 N. Y. S. 419, 45 N. Y. St. 431; Neill v. Shamburg, 158 Pa. St. 263, 27 Atl. 992; Stannard v. Smith, 40 Vt. 513.

[38] Mayes v. Palmer, 208 Fed. 97, 125 C. C. A. 325.

[39] Willoughby v. Hildreth, 182 Mo. App. 80, 167 S. W. 639.

[40] Gilpin v. Temple, 4 Harr. (Del.) 190; Doggett v. Jordan, 2 Fla. 541; Drake v. Elwyn, 1 Caines (N. Y.) 184; Cobb v. Martin, 32 Okla. 588, 123 Pac. 422. See ante §§ 103, 825.

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the rule defining partnership.[41] It has been held in Alabama that, although after the facts are ascertained, the partnership relation becomes a matter of law, nevertheless, a witness who knows the fact may state, in so many words, that a partnership existed between the parties, but that the party against whom the testimony is offered, may cross-examine the witness as to the sources of his knowledge, and show, if such be the case, that the witness speaks from opinion merely, and with no actual knowledge of the facts.[42] It is, however, doubted that this rule is general, inasmuch as it is not in accord with the usual rule of evidence generally, that the witness should simply state the facts, and that the jury, acting under the instructions of the court as to the law applicable, should determine the final question involved. It is impossible to see any logical reason for making an exception to the general rule of evidence in partnership cases.

§ 880. How facts are proved.—Proof of a partnership, as between the alleged partners, must be stronger than as against the alleged partner by a third person.[43] The reason for this rule we have seen heretofore. The actual existence of the partnership which implies intention is necessary as between the alleged partners themselves, while a third party may hold the alleged partners to partnership relations, or to a partnership as far as the third party is concerned, even when there is no actual partnership as between the alleged partners themselves. Universal partnerships are rare, and the courts will not hold a partnership universal unless the evidence thereof is very clear.[44] Evidence that a person was "interested" in a certain business does not establish the existence of a partnership therein on the part of such person.[45] Strict proof is required of one who seeks to prove a verbal contract of partnership against the representatives of a deceased person, both as to the existence and the provisions of such partnership contract.[46] Partnership, like every other

[41] Everitt v. Chapman, 6 Conn. 347.
[42] McGrew v. Walker, 17 Ala. 824.
[43] Robinson v. Green, 5 Harr. (Del.) 115.
[44] Gray v. Palmer, 9 Cal. 616.
[45] Levy v. McDowell, 45 Tex. 220.
[46] Kelly v. Devlin, 47 N. Y. Super. Ct. 555.

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fact, must be proved by competent evidence, and it can not be shown by mere supposition.[47] It may, however, be shown not only by an actual written contract, but by parol, by the acts of the parties, their admissions—in fact, by the circumstances of the case.[48] The simple denial of the fact of partnership by one sought to be charged as a partner is admissible in evidence.[49] Such denial will, however, not avail the defendant if the evidence, as a whole, shows that, in fact, the essential elements of a partnership are present.[50] Likewise, a person suing on a note, alleged to be given by a partnership, may testify that at the time he received the note, he believed the defendants to have been partners.[51] Such testimony, however, could be attacked by compelling the party so testifying to give the facts upon which he based his belief, and it is not believed that his testimony as to his belief would have any bearing upon the question of partnership unless the facts upon which he relied justified such a belief.

§ 881. Facts to be proved.—The facts to be proved to establish a partnership vary somewhat in the various jurisdictions, depending upon the different tests of partnership adopted, as explained heretofore. If intention governs, it must be clearly shown. If the contract of partnership is in writing, it will control, unless the contract is clearly ambiguous, in which case parol evidence may be introduced to explain the ambiguity. If the partnership agreement is not in writing, the intention of the parties must be ascertained from their words and conduct. Even when the contract is in writing, according to the usual rule in contracts, it may be changed or modified by a subsequent written or verbal contract assented to by each member of the firm, and this change may be shown by acts of the partners. This should be remembered: that a true partnership, one between the partners themselves, can not be proved except by showing their voluntary consent, either express or implied from their acts. In

[47] Hudson v. Simon, 6 Cal. 453.
[48] Kelleher v. Tisdale, 23 Ill. 405.
[49] Chambers v. Grout, 63 Iowa 342, 19 N. W. 209.
[50] Cogswell v. Wilson, 11 Ore. 371, 4 Pac. 1130.
[51] Seekell v. Fletcher, 53 Iowa 330, 5 N. W. 200.

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such a case the intention is essential, and must be shown by competent evidence.[52] As a general rule, and in most jurisdictions, partnership relation as to third parties may be shown in several ways, chief of which, perhaps, is proof of sharing of profits and losses. Mr. Lindley, in his work on Partnership, says that, "the writer is not aware of any case in which persons who have agreed to share profits and losses have not been held to be partners."[53] Our Federal courts have held that, in order to establish the existence of a partnership, inter sese, there must be shown to be an existing community of interest and participation in profit and loss.[54] It has been held, however, that it need not be proved that each partner, as between themselves, is liable to share indefinitely in the losses of the concern. It is sufficient if it be shown that the partners share in the profits and the losses, so far as they affect the capital invested.[55] If it be shown that two or more persons have purchased real estate jointly, and it is sought to hold them as partners, it should be shown by competent evidence that their intention was to sell the real estate for their joint profit.[56] An agreement between two or more parties to share the profits of a joint enterprise, nothing being said as to losses, is prima facie an agreement to share losses also, in the absence of a statute to the contrary, and further proof is in such case unnecessary, as to such intention to share losses.[57] This presumption, however, may, at least inter sese, be rebutted by evidence showing that the intention of the parties was not to enter partnership relations, or to share losses. An Illinois case, however, goes to the extent of holding that an agreement to share the net profits necessarily implies a sharing of the losses.[58] This case, however, is believed to apply the rule to a greater extent than is followed generally, and the rule above given, that

[52] Hedge's Appeal, 63 Pa. St. 273.
[53] Lindley Partnership, p. 10.
[54] Felichy v. Hamilton, 1 Wash. (U. S.) 491. Fed. Cas. No. 4719.
[55] Brigham v. Dana, 29 Vt. 1.
[56] Richards v. Grinnell, 63 Iowa 44, 18 N. W. 668, 50 Am. Dep. 727; Hulett v. Fairbanks, 40 Ohio St. 233; Canada v. Barksdale, 76 Va. 899.
[57] Dix v. Otis, 5 Pick. (Mass.) 38; Heyhoe v. Burge, 9 C. B. 431, 19 L. J. C. P. 243.
[58] Wilcox v. Dodge, 12 Ill. App. 517.

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it is prima facie evidence rather than conclusive evidence, is thought to be the more proper and generally adopted law. For instance, it is generally held that servants may be paid salaries proportionate to the profits of the business without thereby becoming partners. The rule is well and clearly laid down by the court in the Connecticut case of Parker v. Canfield,[59] as follows: "Participation in the profits of a business is strong presumptive evidence of a partnership in it. This rule and the reason apply as well to a party who receives a sum equal to a certain share of the profits of a business as to a party receiving such a share of profits by the name of profits. There are some cases, however, where money received may appropriately be regarded as a sum measured by profits rather than as profits themselves, but whether it shall be so regarded depends upon no arbitrary use of phrases, but upon the nature of the contract and the real consideration upon which the money is received. A share of profits paid to agents to secure exertion is not such a participation in profits as to make the agent liable as partner, and in such cases the money so paid is spoken of as a sum equal to or measured by profits, rather than as a share in the profits themselves." There is perhaps no rule of law more clearly established by a long line of cases than the above.[60]

§ 882. Proof of partnership agreement.—The fact of partnership necessarily implies the consent of the persons joining in the enterprise or undertaking. As between the persons themselves no one can be charged as a partner against his consent, and in order to establish a liability against a party as a partner for or on account of the acts of others the proof must show that the partnership was formed by express agreement; or that the party, sought to be charged, has been guilty of some act by which he is estopped from setting up that he is not in fact a partner.[61]

[59] 37 Conn. 250.

[60] Price v. Alexander, 2 G. Greene (Iowa) 427, 52 Am. Dec. 526; Chaffraix v. Price, 29 La. Ann. 176; Meserve v. Andrews, 104 Mass. 360; Smith v. Perry, 5 Dutch (N. J.) 74; Richardson v. Hughitt, 76 N. Y. 55; Miller v. Bartlett, 15 Serg. & R. (Pa.) 137; Nicholaus v. Thielges, 50 Wis. 491, 7 N. W. 341.

[61] Haycock v. Williams, 54 Ark. 384. 16 S. W. 3; Lincoln Park &c.

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Where a person has not in any manner been held out to the community as a partner in business, and a plaintiff, seeking nevertheless to charge him as such partner, produces a written agreement between the partners to prove such a partnership, the whole of the agreement must be read together, and the plaintiff can not use such parts of the agreement as tend to establish a partnership, and reject such parts as tend to show the contrary.[62] Where it is sought to charge defendants as partners, for goods delivered, a contract providing for a joint enterprise between defendants in the business for which the goods were furnished, is admissible, and is prima facie proof of partnership.[63] It is not essential, however, either to produce or prove a written article of agreement; nor is it required to prove a particular form; it is sufficient to prove mutual consent of two or more competent minds, or as hereafter shown, it may be implied from conduct and circumstances, if sufficiently significant and expressive to convince the mind.[64] But the proof must show that the contract is complete and assented to by all persons sought to be charged.[65] It has been held that a person can not be made a partner so as to bind him, in the absence of proof of his consent, admissions or acts.[66] And

v. Swatek, 204 Ill. 228, 68 N. E. 429; Bishop v. Georgeson, 60 Ill. 484; Phillips v. Phillips, 49 Ill. 437; Leonard v. Sparks, 109 La. Ann. 543, 33 So. 594; Halliday v. Bridewell, 36 La. Ann. 238; Pickerell v. Fisk, 11 La. Ann. 277; Gray v. Gibson, 6 Mich. 300; Lucas v. Cole, 57 Mo. 143; Freeman v. Bloomfield, 43 Mo. 391; Groves v. Tallman, 8 Nev. 178; Sargent v. Collins, 3 Nev. 260; Hallenback v. Rogers, 57 N. J. Eq. 199, 40 Atl. 576; Central City Sav. Bank v. Walker, 66 N. Y. 424; Baldwin v. Burrows, 47 N. Y. 199; Willis v. Crawford, 38 Ore. 522, 63 Pac. 985, 64 Pac. 866, 53 L. R. A. 904; Dawson v. Pogue, 18 Ore. 94, 22 Pac. 637, 6 L. R. A. 176; Kelley v. Bourne, 15 Ore. 476, 16 Pac. 40; Hedge's Appeal, 63 Pa. St. 273; Farmers' Bank v. Smith, 26 W. Va. 541; Woods v. Ward, 48 W. Va. 652, 37 S. E. 520; Setzer v. Beale, 19 W. Va. 274; Miller v. Stone, 69 Wis. 617, 34 N. W. 907; Holgate v. Downer, 8 Wyo. 334, 57 Pac. 918.

[62] Manhattan Brass Mfg. Co. v. Sears, 31 N. Y. Super. Ct. (1 Sweeny) 426.

[63] Flock v. Williams, 175 Ill. App. 319.

[64] Causler v. Wharton, 62 Ala. 358.

[65] Metcalf v. Redmon, 43 Ill. 264; Morrill v. Spurr, 143 Mass. 257, 9 N. E. 580; Stewart v. Robinson, 115 N. Y. 328, 22 N. E. 160, 163, 5 L. R. A. 410; Cantara v. Blackwell, 14 Wash. 294, 44 Pac. 657.

[66] Bishop v. Georgeson, 60 Ill. 484.

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it has been held that "A partnership is never created between parties by implication or operation of law, apart from an expressed or implied intention and agreement to constitute the relation."[67] Ordinarily, the limits of partnership liability are determined by the agreement in the absence of estoppel.[68] A prima facie case of partnership may be made out against persons associated in carrying on a certain business by evidence showing that they are common proprietors of a business conducted for their mutual benefit.[69]

§ 883. Proof of partnership—Uniform Partnership Act. —The Uniform Partnership Act lays down certain rules for determining the existence of a partnership which govern very largely the admissibility and weight of evidence in actions under that act. Section seven provides: "In determining whether a partnership exists these rules shall apply: (1) Except as provided by section 16 [relating to partner by estoppel] persons who are not partners as to each other are not partners as to third persons. (2) Joint tenancy, tenancy in common, tenancy by the entireties, joint property, common property, or part ownership does not of itself establish a partnership, whether such co-owners do or do not share any profits made by the use of the property. (3) The sharing of gross returns does not of itself establish a partnership, whether or not the persons sharing them have a

[67] Bushnell v. Consolidated Ice Mach. Co., 138 Ill. 67, 27 N. E. 596; Wilson v. Cobb, 28 N. J. Eq. 177; Hallenbeck v. Rogers, 57 N. J. Eq. 199, 40 Atl. 576; Gibb's Estate, 157 Pa. St. 59, 27 Atl. 383, 22 L. R. A. 276; Hedge's Appeal, 63 Pa. St. 273; Holgate v. Downer. 8 Wyo. 334, 57 Pac. 918; 1 Bates Partnership, § 3.

[68] Henderson v. E. W. Emerson Co., 105 Ark. 697, 151 S. W. 251.

[69] Chaffee v. Rentfroe, 32 Ga. 477; Winstanley v. Gleyre, 146 Ill. 27, 34 N. E. 628; Field v. Eilers, 103 Ill. App. 374; Creighton v. Garcia, 41 Ill. App. 429; Gensburg v. Field, 104 Iowa 599, 74 N. W. 3; Schmidt v. Ittman, 46 La. Ann. 888, 15 So. 310; Case v. Baldwin, 136 Mass. 90; Webb v. Johnson, 95 Mich. 325, 54 N. W. 947; Meyers v. Boyd, 44 Mo. App. 378; Farr v. Wheeler, 20 N. H. 569; Clements v. Mitchell, 59 N. Car. 171; Holt v. Kernodle, 23 N. Car. 199; Rowland v. Estes, 190 Pa. St. 111, 42 Atl. 528; Wagner v. Sanders, 62 S. Car. 73, 39 S. E. 950; Brigham v. Dana, 29 Vt. 1; Wipperman v. Stacy, 80 Wis. 345, 50 N. W. 336.

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joint or common right or interest in any property from which the terms are derived. (4) The receipt by a person of a share of the profits of a business is prima facie evidence that he is a partner in the business, but no such inference shall be drawn if such profits were received in payment: (a) As a debt by instalments or otherwise, (b) As wages of an employé or rent to a landlord, (c) As an annuity to a widow or representative of a deceased partner, (d) As interest on a loan, though the amount of payment vary with the profits of the business, (e) As the consideration for the sale of the good will of a business or other property by instalments or otherwise."

§ 884. Agreement—Proof by assent and ratification.—The rule requiring proof of an agreement among persons in order to bind them does not require that it be shown that the persons seeking to be charged as partners actually signed a written agreement; nor is it carried to the extent of holding that the proof must show that the parties met and simultaneously and mutually agreed to certain definite propositions. The law does not require such strict proof. It is sufficient to show that the parties assented to or acquiesced in a general arrangement or to the introduction of a new member in the firm. Thus, where one partner without the consent of his copartners introduced a stranger into the firm, and it appeared that the other partners were made acquainted with the facts but made no objection, and the business was conducted with the new member as a part of the firm, it was held that the consent of the other persons could be implied from the acquiescence and acts of the parties.[70] So, while an agent for a certain purpose has no power to form a partnership between his principal and a third person, yet it was held that where an agent did form such a partnership in the name of the principal with his knowledge, and it further appeared that the principal acted as partner in the firm thus formed without objection it was held to

[70] Tabb v. Gist, 1 Brock. (U. S.) 33, 6 Call 279, Fed. Cas. No. 13719; Meaher v. Cox, 37 Ala. 201; Rosenstiel v. Gray, 112 Ill. 282; Miller v. Rapp, 135 Ind. 614, 34 N. E. 981, 35 N. E. 693; Mason v. Connell, 1 Whart. (Pa.) 381.

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be a ratification of the partnership agreement and the principal was liable as a partner.[71] And where partnership articles provided that at the death of one partner his children should succeed to the share of the father, and upon the death of the father as such partner the children who were of lawful age continued to draw the same amount monthly from the firm as the father had drawn, it was held that this was an acceptance of the successorship to the rights and liabilities of the deceased partner, and that the children were liable.[72] But the mere receipt of money coming from the supposed partnership business, without the knowledge of the person sought to be charged with it, is not a sufficient ratification to charge the person receiving the money.[73]

§ 885. Proof by certificate.—Some statutes require that a mercantile or trading partnership shall record in some of the public records either the articles of partnership or a statement of the names of the persons composing the firm. Such statutes further provide that on the recording of the instrument or the names of the members of the firm the officer having custody of the record shall issue under his name and the seal of his office a certificate to the effect that such persons are partners and that they are authorized to conduct their business in such firm name. Where the statute requires this record and certificate it has been held that in actions by or against such partners the official certificate is competent evidence and sufficient proof of such partnership and that the persons named therein are the partners in the firm.[74] But in states having such statutes and providing that the official certificates shall be prima facie evidence, it has been held that such a certificate is not the only method of proving the partnership, but that it may be proved in the absence of such certificate and as if there were no such statutory requirement,

[71] Williams v. Butler, 35 Ill. 544; Wright v. Boynton, 37 N. H. 9, 72 Am. Dec. 319.

[72] Nave v. Sturges, 5 Mo. App. 557.

[73] Love v. Payne, 73 Ind. 80, 38 Am. Rep. 111; Central City Sav. Bank v. Walker, 66 N. Y. 424.

[74] Mortimer v. Marder, 93 Cal. 172, 28 Pac. 814; Milligan v. Butcher, 23 Nebr. 683, 37 N. W. 596.

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or as any other fact is proved.[75] This rule, however, will not hold if the statute should provide that the certificate is exclusive. Such a provision is, however, very improbable, at least when the partnership is sued by third persons, as it would, in many instances, furnish a shield for persons not wanting to incur partnership liability, but who are, in fact, partners, and who could neglect, for this reason, to register their partnership. It would revolutionize the law of partnership and break down those rules which have gradually crept into the law of partnership for the protection of those persons dealing with partnerships. The mere testimony of a partner that, so far as he knew, the firm had not complied with statutory requirements, will not establish a defense that no certificate was filed.[76]

§ 886. Parol proof to establish partnership.—The best evidence of partnership is usually, as is the case in other matters, written evidence. But other evidence is admissible, and may even supersede the written evidence. The existence of the partnership, and the extent of each party's interest therein may be shown by parol, under certain conditions.[77] In an action by a third person against alleged partners according to rules elsewhere stated it is sufficient to establish their liability to show the admissions of such fact by the alleged partners, or that they have held themselves out to the public as such. The rule is that such proof may be made by parol. It is generally held that in actions by third persons against persons who are alleged to be partners, such partnership may be established by parol evidence even where it appears from the evidence on the trial of the case that there is a written agreement between the parties as to the partnership. The plaintiff will not be required to produce the written articles in order to establish partnership.[78] And in actions

[75] Hanfek v. Held, 75 Nebr. 210, 106 N. W. 171; Maxwell v. Higgins, 38 Nebr. 671, 57 N. W. 388.

[76] Croft v. Bain, 49 Mont. 484, 143 Pac. 960.

[77] Frankenstein v. North, 79 Ill. App. 669; Van Housen v. Copeland, 79 Ill. App. 139.

[78] Griffin v. Stoddard, 12 Ala. 783; Crawford v. Stove Pipe Works, 83 Cal. 629, 24 Pac. 836; Daugherty v. Heckard, 89 Ill. App. 544; Henshaw

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by partners against third persons it has been held proper to prove such fact by parol evidence, although a written article of agreement exists which contains the partnership agreement; but when it is made to appear that the terms of the partnership are material, then the articles themselves must be produced.[79]

§ 887. Proof of acts and conduct to show partnership.—Partnership may be established by proof of acts and conduct. No rule can be given as to what particular acts or conduct must be proved in order to establish the relation; nor can the nature and character of the acts be designated. It is only essential that the proof be sufficient to establish such acts and conduct from which the partnership may be reasonably inferred. As tending to establish the relation of partnership proof may be made of the acts and conduct such as advertisements in newspapers that were taken and read by the party sought to be charged as a partner; or advertisements by cards, letterheads, placards or signs; personal supervision of the business and receipt of goods in the firm name; the fact that the party sought to be charged was introduced as a member of the partnership, and any representations, conduct or circumstances are proper and competent which are naturally calculated or likely to beget the belief that the parties were partners.[80] The fact of the existence of a partnership may be proved

v. Root, 60 Ind. 220; Villa v. Jonte, 17 La. Ann. 9; Bryer v. Weston, 16 Maine 261; Bishop v. Austin, 66 Mich. 515, 33 N. W. 525; Rosenbaum v. Howard, 69 Minn. 41, 71 N. W. 823; McEvoy v. Bock, 37 Minn. 402, 34 N. W. 740; Bissell v. Warde, 129 Mo. 439, 31 S. W. 928; Brem v. Allison, 68 N. Car. 412; Reed v. Kremer, 111 Pa. St. 482, 5 Atl. 237, 56 Am. Rep. 295; Edwards v. Tracy, 62 Pa. St. 374; Widdifield v. Widdifield, 2 Bin. (Pa.) 245; Furber v. Carter, 11 Humph. (Tenn.) 271; Cutler v. Thomas, 25 Vt. 73; Plano Mfg. &c. Co. v. Frawley, 68 Wis. 577, 32 N. W. 768.

[79] Field v. Tenney, 47 N. H. 513.

[80] Chaffee v. Rentfroe, 32 Ga. 477; Cary v. Simpson, 15 Ga. App. 280, 82 S. E. 918; Fletcher v. Pullen, 70 Md. 205, 16 Atl. 887, 14 Am. St. 355; Peninsular &c. Bank v. Currie, 123 Mich. 666, 82 N. W. 511; Bissell v. Warde, 129 Mo. 439, 31 S. W. 928; Atwood v. Peregoy, 22 Nebr. 238, 34 N. W. 378; Princeton &c. Co. v. Gulick, 16 N. J. L. 161; Sargent v. Collins, 3 Nev. 260; Dobson v. Chambers, 78 N. Car. 334; Lowenstein v. Keller (Tex. Civ. App.), 46 S. W. 878; Davis v. Bingham (Tex. Civ. App.), 46 S. W. 840; Cowie v. Ahrenstedt, 1 Wash. 416, 25 Pac. 458.

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by the habit and course of dealing, and by the conduct and declarations of the partners.[81] Proof of the business intimacy of two persons has been held competent in connection with other facts as a circumstance tending to prove partnership.[82] Where the action is for accounting between the partners, the court may consider the acts and conduct of the parties at the time of and subsequent to the date of the agreement between them.[83] Whatever may be the quantum or degree of proof required, it is held that the existence of a partnership may be established by circumstantial evidence as well as by direct proof.[84] In suits against alleged partners, where the partnership is denied by the alleged partners, the existence of the partnership relation may be proved by direct evidence, or by evidence of the acts, conduct and declarations of the alleged partners.[85] This applies, in general, simply to the party making the declaration.[86] In an action by an employé against an alleged partnership, newspaper items written some time after he began work stating that defendant was the treasurer of the firm, were held inadmissible, on the ground that the plaintiff could not have relied on them in accepting the employment.[87] As to a defendant who pleaded no partnership, it was not error to exclude a letter written to him from the other defendant eleven months after the contract sued on.[88]

§ 888. Admissions by partners, generally.—The admissions of one partner or person engaged in the joint prosecution

Books, papers, accounts and similar writings may be admissible to show existence of a partnership between persons who are described or referred to therein as partners. Cobb v. Martin, 32 Okla. 588, 123 Pac. 422.

[81] Irvine & Muir Lumber Co. v. Holmes, 26 Cal. App. 453, 147 Pac. 229; Richardson v. Keely, 58 Colo. 47, 142 Pac. 167; Smith v. Hart, 179 Ill. App. 98; Bryer v. Weston, 16 Maine 261.

[82] McGrew v. Walker, 17 Ala. 824; Letson v. Hall, 1 Ala. App. 619, 55 So. 944.

[83] Wright v. Amann, 192 Fed. 649.

[84] Loucks v. Paden, 63 Ill. App. 545; Rogers v. Murray, 110 N. Y. 658, 18 N. E. 261, 2 Silv. Ct. App. 101.

[85] Jones v. Purnell, 5 Pennew. (Del.) 444, 62 Atl. 149.

[86] Chamberlin v. Fisher, 117 Mich. 428, 75 N. W. 931.

[87] Gettins v. Hennessey, 60 Ore. 566, 120 Pac. 369.

[88] American Cotton College v. Atlanta Newspaper Union, 138 Ga. 147, 74 S. E. 1084.

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of a common commercial enterprise, within its scope and in furtherance thereof during its continuance, are generally received against all the partners or persons engaged therein,[90] for, by the very act of association, each is constituted the agent of all.[91] But they are not received to prove the partnership, and evidence should first be introduced to prove that fact.[92] So it is generally

[90] Fail v. McArthur, 31 Ala. 26; Pierce v. Roberts, 57 Conn. 31, 17 Atl. 275; McCutchin v. Bankston, 2 Ga. 244; Rudy v. Katz, 23 Ky. L. 1697, 66 S. W. 18; Fickett v. Swift, 41 Maine 65, 66 Am. Dec. 214; Collett v. Smith, 143 Mass. 473, 10 N. E. 173; Coleman v. Pearce, 26 Minn. 123, 1 N. W. 846; Lea v. Guice, 13 Smed. & M. (Miss.) 656; Cady v. Kyle, 47 Mo. 346; Baker v. Union Stockyards Nat. Bank, 63 Nebr. 801, 89 N. W. 269, 93 Am. St. 484; Tucker v. Peaslee, 36 N. H. 167; Gulick v. Gulick, 14 N. J. L. 578; Brown Chemical Co. v. Atkinson, 91 N. Car. 389; Benninger v. Hess, 41 Ohio St. 64; Boyd v. Thompson, 153 Pa. St. 78, 25 Atl. 769, 34 Am. St. 685; Western Assur. Co. v. Fowle, 65 Wis. 247, 26 N. W. 104; Latch v. Wedlake, 11 Ad. & L. 959, 39 E. C. L. 504. In Weed v. Kellogg, 6 McLean (U. S.) 44, Fed. Cas. No. 17345, the admissions of a silent partner were held receivable. See also Garrett v Woodward, 2 Cranch (C. C.) 190. So, as to admissions of partner, since deceased, in an action against his representative. Clark's Exrs. v. Van Riemsdyk, 9 Cranch (U. S.) 153, 3 L. ed. 688; McElroy v. Ludlum, 32 N. J. Eq. 828, and against the surviving partner. Smitha v. Cureton, 31 Ala. 652; Dodds v. Rogers, 68 Ind. 110; Doremus v. McCormick, 7 Gill (Md.) 49; Klock v. Beekman, 18 Hun (N. Y.) 502; Harrison v Neeley, 41 Ohio St. 334; Adams v. Brownson, 1 Tyler (Vt.) 452. But see Ostrom v. Jacobs, 9 Metc. (Mass.) 454; Romer v. Jaecksch, 39 Md. 585; Evers v. Life Assn., 59 Mo. 429.

[91] Pearce v. Roberts, 57 Conn. 31; Coit v. Tracy, 8 Conn. 268; Hahn v. St. Clair &c. Co., 50 Ill. 465; Webster v. Stearns, 44 N. H. 498, 502; Scull's Appeal, 115 Pa. St. 141, 7 Atl. 588; Sandilands v. Marsh, 2 B. & Ald. 673; Nicholls v. Dowding, 1 Stark. 65; Wood v. Bradick, 1 Taunt. 104, 9 Rev. Rep. 711; Rex v. Hardwick, 11 East 578. See leading article on the general subject in 26 Cent. L. J. 491. As to when entries in partnership books are admissible, see Chick v. Robinson, 95 Fed. 619, 37 C. C. A. 205, and extended note to such case as reported in 52 L. R. A. 833.

[92] Scott, Harper &c. Co. v Dansby, 12 Ala. 714; Smith v. Ferrario, 113 Ga. 872, 39 S. E. 428; Vannoy v. Klein, 122 Ind. 416, 23 N. E. 526; Folk v. Wilson, 21 Md. 538, 83 Am. Dec. 599; Dutton v. Woodman, 9 Cush. (Mass.) 255, 57 Am. Dec. 46; Winchester v. Whitney, 138 Mass. 549; Rimel v. Hayes, 83 Mo. 200; Henry v. Willard, 73 N. Car. 35; Pirie &c. Co. v. Gillit, 2 N. Dak. 255, 50 N. W. 710; Cowan v. Kinney, 33 Ohio St. 422; Walker v. Tupper, 152 Pa. St. 1, 10, 25 Atl. 172; McCorkle v. Doby, 1 Strob. L. (S. Car.) 396, 47 Am. Dec. 560. But they may be admissible against himself to show that he was a partner and who con-

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inadmissible for one partner to disprove the existence of the partnership by the declarations of his copartners when the question of partnership is at issue between them and third persons.[92] And they must have been made, as a rule at least, during the existence of the partnership[94] and within the scope of the partnership business.[95] If made prior to the existence of the partnership, they are not receivable against the other parties unless a joint responsibility is shown,[96] nor are they receivable to create any new liability against the other parties if made after the dissolution of the partnership.[97]

stituted the members. Edwards v. Tracy, 62 Pa. St. 374. Lenhart v. Allen, 32 Pa. St. 312; Hawkins &c. Co. v. Lee, 8 Lea (Tenn.) 42; Carr v. Wright, 1 Wyo. 157. See also Rudy v. Katz, 23 Ky. L. 1697, 66 S. W. 18. So, the partnership may be proved by the successive declarations of each and all of the partners. Reed v. Kremer, 111 Pa. 482, 5 Atl. 237, 56 Am. Rep. 295. See generally note to Vanderhurst v. De Witt, 95 Cal. 57, 30 Pac. 94, 20 L. R. A. 595. Entries in books claimed to be partnership books are not of themselves admissible to prove the partnership without in some way connecting the person claimed to be a partner therewith. See note to Chick v. Robinson, 95 Fed. 619, 37 C. C. A. 205, 52 L. R. A. 833.

[93] Danforth v. Carter, 4 Iowa 230; Clark v. Huffaker, 26 Mo. 264; Carlyle v. Plumer, 11 Wis. 96.

[94] Cooper v. Wood, 1 Colo. App. 101, 27 Pac. 884; Munson v. Wickwire, 21 Conn. 513; Winslow v. Newlan, 45 Ill. 145; Hitt v. Allen, 13 Ill. 592; Boor v. Lowery, 103 Ind. 468, 3 N. E. 151, 53 Am. Rep. 519; Conery v. Hayes, 19 La. Ann. 325; First Nat. Bank v. Strait, 65 Minn. 162, 67 N. W. 987; Webster v. Stearns, 44 N. H. 498; McKee v. Hamilton, 33 Ohio 7; Barrett v. Russell, 45 Vt. 43; Catt v. Howard, 3 Stark. 3, 23 Rev. Rep. 751, 3 E. C. L. 570; Burton v. Issitt, 5 B. & Ald. 267. But an assignment of assets is not necessarily an end of the partnership. Hunter v. Hubbard, 26 Tex. 537. Foster v. Fifield, 29 Maine 136.

[95] Winchester & Partridge Mfg. Co. v. Creary, 116 U. S. 161, 29 L. ed. 591, 6 Sup. Ct. 369; People's Nat. Bank v. Harper, 114 Ga. 603, 40 S. E. 717; Boor v. Lowery, 103 Ind. 468, 3 N. E. 151, 53 Am. Rep. 519; Hickman v. Reineking, 6 Blackf. (Ind.) 387; Wells v. Turner, 16 Md. 133; Collett v. Smith, 143 Mass. 473, 10 N. E. 173; Heffron v. Hanaford, 40 Mich. 305; Slipp v. Hartley, 50 Minn. 118, 52 N. W. 386, 36 Am. St. 629; Union Nat. Bank v. Underhill, 102 N. Y. 336, 7 N. E. 293; Hester v. Smith, 5 Wyo. 291, 40 Pac. 310. But see Odiorne v. Maxcy, 15 Mass. 39. It may not always be necessary that they should be made within the real scope of the partnership business, if within the apparent scope or authority held out by all.

[96] Catt v. Howard, 3 Stark. 3, 23 Rev. Rep. 751, 3 E. C. L. 570.

[97] Bell v. Morrison, 1 Pet. (U. S.) 351, 7 L. ed. 174; Thompson v. Bowman, 6 Wall. (U. S.) 316, 18 L. ed

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§ 889. Admissions and declarations in actions by third persons against partners.—In actions by third persons against others to hold them as partners, the declarations or admissions made by one in the absence of the others, tending to establish the existence of such partnership, are only admissible in the first instance against the party making them, but may be shown to charge him as a partner, where he has denied it.[98]

736; Curry v. White, 51 Cal. 530; Mozingo v. Ross, 150 Ind. 588, 691, 50 N. E. 687, 41 L. R. A. 612, 65 Am. St. 387; Yandes v. Lefavour, 2 Blackf. (Ind.) 371; Walker v. Duberry, 1 A. K. Marsh. (Ky.) 189; Bentley v. White, 3 B. Mon. (Ky.) 263, 38 Am. Dec. 186; White v. Kearney, 9 Rob. (La.) 495; Ward v. Howell, 5 Har. & J. (Md.) 60; Owings v. Low, 5 Gill & J. (Md.) 134; First Nat. Bank v. Strait, 65 Minn. 162, 67 N. W. 987; National Bank v. Meader, 40 Minn. 325, 41 N. W. 1043; American Iron Mt. Co. v. Evans, 27 Mo. 552; Little v. Ferguson, 11 Mo. 598; Nichols v. White, 85 N. Y. 531; Hackley v. Patrick, 3 Johns. (N. Y.) 536; Detrick v. McLean, 112 N. Car. 840, 17 S. E. 165; Flanagin v. Federal Champion, 2 N. J. Eq. 51; Kerper v. Wood, 48 Ohio St. 613, 29 N. E. 501, 656; Hogg v. Orgill, 34 Pa. St. 344; Crumless v. Sturgess, 6 Heisk. (Tenn.) 190; Burton v. Issitt, 5 B. & Ald. 267; Kilgour v. Finlyson, 1 H. Bl. 155. See also on the general subject, the elaborate note to Gilmor v. Ham, 142 N. Y. 1, 40 Am. St. 554 et seq. But entries upon the firm books by one partner, made during the existence of the partnership, and known to the other, may be admitted against the latter even after the termination of the partnership. Dunnell v. Henderson, 23 N. J. Eq. 174; Walden v. Sherburne, 15 Johns. (N. Y.) 409. See also Wills Point Bank v. Bates, 72 Tex. 137, 10 S. W. 348; Munson v. Wickwire, 21 Conn. 513. And in some jurisdictions a distinction is drawn between admissions made after dissolution in regard to what took place during the existence of the partnership and not creating any new liability, and those that would create a new liability, and the former are held admissible. Curry v. Kurtz, 33 Miss. 24; Cochran v. Cunningham, 16 Ala. 448, 50 Am. Dec. 186; Parker v. Merrill, 6 Maine 41; Cady v. Shepherd, 11 Pick. (Mass.) 400, 22 Am. St. 379; Gay v. Bowen, 8 Metc. (Mass.) 100; Pennoyer v. David, 8 Mich. 407; Rich v. Flanders, 39 N. H. 304; Pierce v. Wood, 23 N. H. 519; Simpson v Geddes, 2 Bay (S. Car.) 533; Fripp v. Williams, 14 S. Car. 502; Nalle v. Gates, 20 Tex. 315; Pritchard v. Draper, 1 Russ. & M. 191, Taml. 332; Wood v. Braddick, 1 Taunt. 104, 9 Rev. Rep. 711. See also Kirk v. Hiatt, 2 Ind. 322; Lefavour v. Yandes, 2 Blackf. (Ind.) 240. Of course, where the partner has authority in winding up the partnership, he may make admissions that may be competent.

[98] Richardson v. Keely, 58 Colo. 47, 142 Pac. 167; Cary v. Simpson, 15 Ga. App. 280, 82 S. E. 918; Benoliel v. Homac (N. J.), 94 Atl. 605.

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Thus a declaration of one partner as to the existence of the partnership, not made in the presence of his copartner, is not admissible to prove the existence of the partnership, as to the copartner.[99] The answer of one defendant can not be used as evidence of the question of partnership between such defendant and one deceased, as against the administrator of the decedent, who is a codefendant.[1] Likewise, where there is an issue as to whether a business is carried on by defendants as partners, the admission of one of them to the effect that the business belonged to him and his codefendant could not be considered in determining the liability of the other defendants, or the relation of them to the others.[2] But where a partnership alleged to exist between defendants had been denied by them, declarations of each at different times to different persons, in the absence of the other, were held admissible against both to establish the partnership.[3] The rule as to nonadmissibility of declarations of a partner is, however, subject to an exception, where there is other evidence as to the partnership. Where the existence of a partnership is denied, and there is no evidence of its existence, the statement of a partner binds no one but himself; but this rule has no application where there is other testimony establishing the existence of the partnership.[4] And if the existence of the alleged partnership be prima facie established by evidence other than such declarations, then the acts, declarations and admissions of each may be proved to strengthen such prima facie case.[5] So a pamphlet

[99] Owensboro Wagon Co. v. Bliss, 132 Ala. 253, 31 So. 81, 90 Am. St. 907; First Nat. Bank v. Leland, 122 Ala. 289, 25 So. 195; Smith v. Ferrario, 113 Ga. 872, 39 S. E. 428; Thompson v. Mallory, 108 Ga. 797, 33 S. E. 986; Gardner v. North Western Mfg. Co., 52 Ill. 367; Franklin v. Hoadley, 145 App. Div. 228, 130 N. Y. S. 47; Smith v. Southern R. Co., 89 S. Car. 415, 71 S. E. 989; Providence Mach. Co. v. Browning, 70 S. Car. 148, 49 S. E. 325.

[1] Earle v. Art Library Pub. Co., 95 Fed. 544.

[2] Stiervel v. Borman, 63 Ark. 30, 37 S. W. 404. See also Rector v. Robins, 74 Ark. 434, 86 S. W. 667.

[3] Nilsson v. McDole, 73 Wash. 312, 131 Pac. 1141.

[4] McCann v. McDonald, 7 Nebr. 305.

[5] Campbell v. Hastings, 29 Ark. 512; Daugherty v. Heckard, 189 Ill. 239, 59 N. E. 569; Conlan v. Mead, 172 Ill. 13, 49 N. E. 720; Hohnadel

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published by one defendant, before the account sued on commenced, in which he referred to his codefendant as the managing partner, may be admissible.[6] Such declarations of an alleged copartner are cumulative evidence to other competent evidence tending to show the partnership. In an Illinois case in which the question of partnership was raised, the court charged that the jury could consider the statements of the copartner as bearing upon the partnership, provided they first found from the evidence that the said alleged partner, sought to be held, had held himself out as a partner, and that the plaintiffs had notice thereof, and acted thereon. It was held by the higher court that this charge was correct, and that the jury could not have been misled thereby.[7] In an action against a partnership for personal injuries in a mill, where the existence of the partnership had been established and the only issue was whether the firm or one member individually owned or operated the mill, declarations of the partners as to the nature of their holdings were held admissible in evidence, though not made in the presence of each other.[8] And receipt of mail directed to defendant in a firm name within a month after making of plaintiff's alleged contract with them has even been held admissible to show that they were partners.[9] Where a defendant claimed that an alleged partner was merely an employé, sharing in the profits as compensation for his services, a contract between that defendant and a third person, under which the third person was compensated for his services in that manner, was inadmissible.[10] In an action against a partner for goods sold to the firm evidence that he told defendant he was

v. Ellsworth, 154 Ill. App. 484; Currier v. Silloway, 1 Allen (Mass.) 19; Lea v. Guice, 13 Sm. & M. (Miss.) 656; Dixon v. Hood, 7 Mo. 414, 38 Am. Dec. 461; Willoughby v. Hildreth, 182 Mo. App. 80, 167 S. W. 639; Oil Well Supply Co. v. Metcalf, 174 Mo. App. 555, 160 S. W. 897; Edwards v. Tracy, 62 Pa. St. 374.

[6] Flock v. Williams, 175 Ill. App. 319.

[7] Conlan v. Mead, 172 Ill. 13, 49 N. E. 720.

[8] McCaskey v. Gantt Bros., 184 Ala. 642, 64 So. 316.

[9] Vich v. Watts, 155 Iowa 664, 136 N. W. 910.

[10] Phipps v. Little, 213 Mass. 414, 100 N. E. 615.

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a partner and thus obtained credit for the firm, is admissible,[11] and where the defendants in an action on a note defended on the ground that the person executing the note was not a partner, it was sufficient to prove that each of them had admitted he was a partner.[12] It is competent to question the witness as to whether the parties associated had entered into a certain described agreement, and were operating a business under it.[13]

§ 890. Representations made in presence of partner, or in course of business.—There is another exception to the general rule above stated. In case the admissions of partnership were made by an alleged partner in the presence of and in the knowledge of the person sought to be charged, they are competent evidence if such person consented to the issue, either expressly or impliedly. Even in case the party denying the fact of partnership was not present at the time the said admissions were made, but later, when the said admissions were repeated to him, and he admitted their truth, the admission of such statements of the other party is proper.[14] And it seems to be the rule that declarations of a partner when made in the prosecution of the partnership business are admissible. On this subject the Supreme Court of Indiana said: "The declarations of one partner are admissible in proper cases against the firm, on the ground that in such cases the law implies an agency on the part of the one to bind the firm in transactions relating to its business. In order that such declarations may be admitted, they must

[11] Brown v. Brown (Tex. Civ. App.), 155 S. W. 551.

[12] Swygert v. Bank of Haralson, 13 Ga. App. 640, 79 S. E. 759.

[13] O'Donohue v. Bruce, 92 Fed. 858, 35 C. C. A. 52; Cain Lumber Co. v. Standard Dry Kiln Co., 108 Ala. 346, 18 So. 882; Butte Hardware Co. v. Wallace, 59 Conn. 336, 22 Atl. 330; Barwick v. Alderman, 46 Fla. 433, 35 So. 13; Thornton v. McDonald, 108 Ga. 3, 33 S. E. 680; Perry v. Randolph, 6 Sm. & M. (Miss.) 335; Adee v. Cornell, 25 Hun (N. Y.) 78; Quincey v. Young, 5 Daly (N. Y.) 327; Smith v. Wright, 4 Abb. Dec. (N. Y.) 274, 1 Abb. Pr. 243; Wray v. Spence, 145 Pa. St. 399, 22 Atl. 693; Given v. Albert, 5 Watts & S. (Pa.) 333; Wood v. Connell, 2 Whart. (Pa.) 542; Reab v. Pool, 30 S. Car. 140, 8 S. E. 703; Ruppell v. Roberts, 4 N. & M. 31, 30 E. C. L. 574.

[14] Huyssen v. Lauson, 90 Mo. App. 82.

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have been made in the course of the partnership business, and with respect to a transaction pertaining to its business."[15] And declarations made by the partners themselves while engaged in the partnership business have been held competent in their favor to establish the partnership.[16]

§ 891. **Representations against interest.**—The admission of a party sought to be charged as a partner, that he was a member of the partnership, is competent evidence against him to prove him a partner, and it matters not whether the admission was made directly to a party seeking to charge him or to a third person.[17] It has been held that in an action against defendants as partners for goods sold and delivered to a firm on the order of one of the alleged partners, it was error not to permit plaintiff to introduce letters from such defendant and from the firm, received in the ordinary course of business, for the purpose of showing that such defendant was connected in business with the firm, and had charge of its financial transactions.[18] A Michigan decision even goes so far as to hold that in an action against persons as copartners to recover for produce sold the alleged firm, it was error to refuse to allow defendants to testify concerning the relation existing between them.[19] A partnership alleged to exist between defendants having been denied by them, declarations of each at different times to different persons, in the absence of the other, are held admissible against both of the partners, to establish the partnership, and it is also held that where goods were sold to an alleged partnership in 1910 and 1911, alleged declarations of the partners, as to the existence of the firm, made in 1908 and 1909, were admissible, and not objectionable for remoteness.[20] On the contrary, declarations of a partner, relating to the exist-

[15] Boor v. Lowery, 103 Ind. 468, 3 N. E. 151, 53 Am. Rep. 519; Britton v. Britton, 19 Ind. App. 638, 49 N. E. 1076.

[16] Gilbert v. Whidden, 20 Maine 367.

[17] Barwick v. Alderman, 46 Fla. 433, 35 So. 13. See also Dodds v. Everett-Ridley-Ragan Co., 110 Ga. 303, 34 S. E. 1004.

[18] Barth v. Paul, 50 Misc. 600, 99 N. Y. S. 425.

[19] Scholtz v. Friend, 128 Mich. 72, 87 N. W. 130.

[20] Nilsson v. McDole, 73 Wash. 312, 131 Pac. 1141.

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ence of the partnership, made after the creation of a debt sued for, are inadmissible to estop a defendant from denying that he was a partner at the time of the purchase, since the issue is the existence of the partnership at the time of the creation of the debt.[21] Showing the same rule as to time, a Colorado case holds that a bill of sale, severing defendant's connection with the firm, made before plaintiff had even dealt with the firm, is admissible to show the defendant's withdrawal, though plaintiff had no notice of the same.[22] Where one person is sought to be held upon negotiable paper signed by another person, upon the ground that the individual name signed was the signature of a partnership composed of the party signing and the party sought to be charged, the nature of the consideration of the negotiable instrument, and the statement made by the codefendant at the time it was given, and papers signed or written by him, or by his procurement, and bearing upon the question of the partnership, are admissible in evidence against the party sought to be charged.[23] In a suit against an alleged partnership, where one alleged partner denied the partnership, printed letter-heads containing the alleged partnership name and the names of the alleged partners as "associate presidents," together with evidence that such letter-heads were used by said defendant, are admissible.[24]

§ 892. Representations in interest.—Declarations made by one sought to be charged as a partner, to the effect that he was not a member of the firm in question, are inadmissible.[25] Nor can existence of a partnership be proved by declarations of the person asserting such existence.[26] Representations against interest may be, as a rule, admitted in evidence, while self-serving declarations, can not, as a rule, be admitted.

[21] Huyssen v. Lauson, 90 Mo. App. 82.

[22] Mullins v. Gilligan, 12 Colo. App. 13, 54 Pac. 1106.

[23] Brannon v. Hursell, 112 Mass. 63.

[24] American Cotton College v. Atlanta Newspaper Union, 138 Ga. 147, 74 S. E. 1084.

[25] Marks v. Hardy, 117 Ky. 663, 78 S. W. 1105. See also Gilroy v. Loftus, 21 Misc. 317, 47 N. Y. S. 138.

[26] Graham v. Swann, 148 Ky. 608, 147 S. W. 11.

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§ 893. **Admissions by judgment.**—Partnership may be proved by a judgment against the firm as an admission. But the effect of an admission can not be given to a judgment rendered on a controverted or contested liability. In order for a judgment to have the effect of such an admission it must have been rendered on default after personal service or the like; such a judgment is admissible in a subsequent action by a stranger against the same defendants to charge them as partners.[27] But such a judgment used as an admission has only the effect of an admission and is not conclusive; it is competent for the defendants to show all the facts and circumstances under which such an admission was made.[28]

§ 894. **Records and pleadings in former cases.**—There seems to be some difference of opinion in different jurisdictions as to when records of former cases are admissible in evidence to establish a partnership. One line of decisions hold that, under certain circumstances the records of a former suit, showing the partnership, may be introduced in evidence, even though the parties plaintiff in the second suit may be different from those in the first suit.[29] A second line of decisions hold that in order for such evidence to be admissible, the former suit should have been between the same parties as in the suit in which the evidence is sought to be introduced.[30] A third rule has been adhered to. In an action upon a promissory note, where a defendant is sought to be held as a partner, evidence of suits and judgments in which said defendant was joined as a partner, both by and against the firm, prior to the execution of the note sued upon, was held to be inadmissible.[31]

[27] Central R. &c. Co. v. Smith, 76 Ala. 572, 52 Am. Rep. 353; Fleshman v. Collier, 47 Ga. 253; Collier v. Cross, 20 Ga. 1; Parks v. Mosher, 71 Maine 304; Prentiss v. Kelley, 41 Maine 436; Cragin v. Carleton, 21 Maine 492; Ellis v. Jameson, 17 Maine 235; Dutton v. Woodman, 9 Cush. (Mass.) 255, 57 Am. Dec. 46; Latham v. Kenniston, 13 N. H. 203; City Bank v. Dearborn, 20 N. Y. 244; Marks v. Sigler, 3 Ohio St. 358.

[28] Parks v. Mosher, 71 Maine 304.

[29] Cragin v. Carleton, 21 Maine 492; Marks v. Sigler, 3 Ohio St. 358.

[30] Dutton v. Woodman, 9 Cush. (Mass.) 255, 57 Am. Dec. 46.

[31] Collier v. Cross, 20 Ga. 1.

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§ 895. Proof of firm name as prima facie evidence of partnership.—It is not absolutely essential to the existence of a partnership that the persons either agree upon or use a firm name. But it is almost the universal custom for persons to adopt and use what is known and styled as a firm name, and in such name they transact their business. Each partner as the agent of each other and of the firm is authorized to execute the contracts and do the business of the partnership in such firm name. From this general, if not universal custom of employing the firm name for the conduct of the business, the rule has arisen that proof of the firm name is prima facie evidence of partnership.[32] Proof of the fact that the business was conducted in the firm name coupled with further proof of the fact that the persons alleged to have constituted the partnership each gave his personal attention to the business, raises a strong presumption that they were in fact partners.[33] Proof of the fact that goods came to the place of business of the partners in the firm name, with the knowledge of the alleged partners, was held sufficient prima facie proof of the alleged partnership.[34] So, the proof of the execution of a note in the firm name by one of the partners is an admission of the existence of such firm and is prima facie the debt of the firm.[35] It seems to be the rule that the use of the words "and company" is prima facie evidence that the firm is composed of more persons than those whose names appear in the firm name. This is especially true where the statute requires that such words shall represent an actual partner.[36] An instrument executed by one of the partners in the firm name, but in nowise connected

[32] Reed v. Reed, 6 Ky. L. 521; Charman v. Henshaw, 15 Gray (Mass.) 293; Schultze v. Steele, 69 Mo. App. 614; Meriden Nat. Bank v. Gallaudet, 120 N. Y. 298, 24 N. E. 994; Livingston v. Roosevelt, 4 Johns. (N. Y.) 251, 4 Am. Dec. 273; Schroth v. Gedney, 30 Misc. (N. Y.) 808, 61 N. Y. S. 923.

[33] Haug v. Haug, 90 Ill. App. 604; Glass v. Walker, 17 Ky. L. 189, 30 S. W. 22; Parker v. Oakley (Tenn.), 57 S. W. 426.

[34] Chaffee v. Rentfroe, 32 Ga. 477.

[35] Griener v. Ulerey, 20 Iowa 266; Holmes v. Porter, 39 Maine 157; Barrett v. Swann, 17 Maine 180; Etheridge v. Binney, 9 Pick. (Mass.) 272; Whitlock v. McKechnie, 1 Bosw. (N. Y.) 427.

[36] Whitlock v. McKechnie, 1 Bosw. (N. Y.) 427.

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with the transaction in question was held competent evidence as an admission of partnership.[37] In an action on a note executed by one partner in the firm name in order to hold the other partners the proof must show that the note was executed in the partnership business and for the purpose of the partnership.[38] And in an action on a note executed in the name of the firm where the execution was denied, it was held proper and competent to show that in other transactions with other parties, prior to the execution of the note in suit the party denying the execution of the note had acquiesced in the use of his name by the other partner.[39] So, where it appears that printed cards containing the name or the style of the firm, were distributed in the vicinity of the place of the business of the firm, and one of them was shown to be fastened on the inside of the door of the storeroom in which the firm did business, this was held sufficient proof of the firm name.[40] So, a writing signed by defendant as "treasurer" of a firm has been held admissible to prove the existence of the partnership.[41] Receipt of mail which was directed to defendants in a firm name within a month after the making of plaintiff's alleged contract with them has been held admissible to show that they were partners.[42] Though the name of a partner was omitted from affidavits and deeds, this was held not to prevail over constant recognition in other respects that he was a member of the firm.[43]

§ 896. Use of individual names of partners in firm name. —A partnership may be proved by the use of an individual's name on advertisements, circulars, bills and letter-heads, on office doors and signs, as a part of a firm name and by other like mat-

[37] Crowell v. Western Reserve Bank, 3 Ohio St. 406.

[38] Bays v. Conner, 105 Ind. 415, 5 N. E. 18; Graves v. Kellenberger, 51 Ind. 66; Ditts v. Lonsdale, 49 Ind. 521.

[39] Ditts v. Lonsdale, 49 Ind. 521.

[40] Michael v. Workman, 5 W. Va. 391.

[41] Cary v. Simpson, 15 Ga. App. 280, 82 S. E. 918.

[42] Vich v. Watts, 155 Iowa 664, 136 N. W. 910.

[43] Demain v. Huston, 70 W. Va. 306, 73 S. E. 923.

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ters.[44] This rule is based upon the principle of estoppel, and while the party so allowing the use of his name in the partnership, may or may not be an actual partner therein, he will be held to partnership liability to all those who deal with the firm, relying on the alleged partner's connection with the firm. In order for such evidence to be admissible, however, it is essential that it be shown that the party sought to be charged knew of the use of his name, or assented thereto, as otherwise no question of estoppel could arise as against him.[45] In order to show such knowledge by the alleged partner, the fact that handbills, with the name of the firm signed to them, were posted at various places in the town where defendant resided, and that one of the bills was posted on the door of the house where the alleged partner boarded, has been held to be admissible in evidence.[46] Letters and memoranda, written or assented to by the alleged partner, which show the essentials of the partnership, and the alleged partner's connection therewith, are admissible for such purpose.[47]

§ 897. Profit sharing as proof of partnership.—The rule adopted and followed by the early authorities and adjudications was that proof of an agreement to share in the profits of a business was regarded as sufficiently decisive to charge a party thus sharing with liability as a partner as to third persons. But the exceptions to this rule have become so numerous and pronounced that it scarcely remains as a rule of proof in partnership matters. There are now so many instances in which the compensation of servants and agents is determinable by the profits of the business that the mere proof of profit sharing is no longer decisive of the question of the liability of the person so sharing the profits as a partner. The recent and modified rule on this subject may be thus stated: Participation in the profits of the business

[44] Uhl v. Harvey, 78 Ind. 26; American Cotton College v. Atlanta Newspaper Union, 138 Ga. 147, 74 S. E. 1084; Phipps v. Little, 213 Mass. 414, 100 N. E. 615.

[45] McNeill v. Reynolds, 9 Ala. 313.

[46] Tumlin v. Goldsmith, 40 Ga. 221; Barcroft v. Haworth, 29 Iowa 462.

[47] Baxter v. West, 1 Drew. & Sm. 173.

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is prima facie strong evidence of a partnership in it. Many adjudicated cases hold that proof of an agreement to share in the profits of a business or undertaking engaged in by two or more, is sufficient to establish the fact of partnership in the absence of any other proof.[48] Some cases hold that if the proof shows that a person shares in the profits as a principal, and not as a mere agent, factor or servant, it is sufficient to establish the fact of partnership.[49] Some exceptions have apparently been made to

[48] Citizens' Nat. Bank v. Hine, 49 Conn. 236; Parker v. Canfield, 37 Conn. 250, 9 Am. Rep. 317; Dalton City Co. v. Hawes, 37 Ga. 115; Dalton City Co. v. Dalton Mfg. Co., 33 Ga. 243; Irvin v. Nashville &c. R. Co., 92 Ill. 103, 34 Am. Rep. 116; Illinois &c. Co. v. Reed, 102 Iowa 538, 71 N. W. 423; Holbrook v. Oberne, 56 Iowa 324, 9 N. W. 291; Aultman v. Fuller, 53 Iowa 60, 4 N. W. 809; Kuhn v. Newman, 49 Iowa 424; Scott v. Colmesnil, 7 J. J. Marsh. (Ky.) 416; Craig v. Alverson, 6 J. J. Marsh. (Ky.) 609; Saufley v. Howard, 7 Dana (Ky.) 367; Cooley v. Broad, 29 La. Ann. 345, 29 Am. Rep. 332; Chaffraix v. Price, 29 La. Ann. 176; Hallet v. Desban, 14 La. Ann. 529; Marks v. Stein, 11 La. Ann. 509; Holden v. French, 68 Maine 241; Pettee v. Appleton, 114 Mass. 114; Scholtz v. Freud, 128 Mich. 72, 87 N. W. 130; Canton Bridge Co. v. Eaton Rapids, 107 Mich. 613, 65 N. W. 761; Sager v. Tupper, 38 Mich. 258; Bohrer v. Drake, 33 Minn. 408, 23 N. W. 840; Brownlee v. Allen, 21 Mo. 123; Lomme v. Kintzing, 1 Mont. 290; Strader v. White, 2 Nebr. 348; Eastman v. Clark, 53 N. H. 276, 16 Am. Rep. 192; Bromley v. Elliot, 38 N. H. 287, 75 Am. Dec. 182; Brown v. Cook, 3 N. H. 64; Brundred v. Muzzy, 25 N. J. L. 268; Magovern v. Robertson, 116 N. Y. 61, 22 N. E. 398, 5 L. R. A. 589; Hackett v. Stanley, 115 N. Y. 625, 22 N. E. 745; Mason v. Partridge, 66 N. Y. 633; Leggett v. Hyde, 58 N. Y. 272, 47 How. Pr. 524, 17 Am. Rep. 244; Manhattan &c. Co. v. Sears, 45 N. Y. 797, 6 Am. Rep. 177; Wolf v. Lawrence, 33 Misc. 481, 62 N. Y. S. 900; Jones v. Call, 93 N. Car. 170; Falkner v. Hunt, 73 N. Car. 571; Holt v. Kernodle, 23 N. Car. 199; Cox v. Delano, 14 N. Car. 89; Choteau v. Raitt, 20 Ohio St. 132; Wood v. Vallette, 7 Ohio St. 172; Merrall v. Dobbins, 169 Pa. St. 480, 32 Atl. 578; Wessels v. Weiss, 166 Pa. St. 490, 31 Atl. 247; Kifer v. Smyers (Pa.), 15 Atl. 904; Hart v. Kelley, 83 Pa. St. 286; Irwin v. Bidwell, 72 Pa. St. 244; Chapman v. Lipscomb, 18 S. Car. 222; Morris v. Wood (Tenn. Ch.), 35 S. W. 1013; Buchanan v. Edwards (Tex. Civ. App.), 51 S. W. 33; Edwards v. Buchanan, 14 Tex. Civ. App. 268, 36 S. W. 1022; Stratton v. O'Connor (Tex. Civ. App.), 34 S. W. 158; Duryea v. Whitcomb, 31 Vt. 395; Dow v. Dempsey, 21 Wash. 86, 57 Pac. 355; Upton v. Johnston, 84 Wis. 8, 54 N. W. 266; Rosenfield v. Haight, 53 Wis. 260, 10 N. W. 378, 40 Am. Rep. 770; Sprout v. Crowley, 30 Wis. 187; Appleton v. Smith, 24 Wis. 331.

[49] Hallet v. Desban, 14 La. Ann. 529.

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this general rule, but such exceptions are found to rest in a real distinction. A familiar illustration of the apparent exception is found in the case where joint owners of a ship became partners by using it in a joint enterprise under an agreement to share in the profits and losses for the particular venture. It was held that the joint owners were partners in the use of earnings, although as to the vessel itself they were joint owners. The holding is in effect that there was partnership without community of interest.[50] Of this rule the Supreme Court of Pennsylvania say: "Participation in the profits is not conclusive proof of the existence of the partnership relation, but both in England and in this country it is cogent evidence upon the question. It puts the defendant upon his proofs explanatory of the fact. If he is able to show that such participation was referable to some other reason, such as compensation for services rendered by him as agent, broker, salesman or otherwise, the prima facies is overcome."[51] The rule has been stated that sharing profits does not of itself necessarily constitute a partnership but merely tends to show that the person who has a right to share profits is a partner.[52]

§ 898. Proof of sharing in profits and losses.—The existence of an actual partnership as held by one class of cases may be conclusively established by proof of an actual community of interest accompanied by an agreement to participate in the profits and to share in the losses of the business or venture. And proof of an actual sharing in profits and losses is generally held sufficient without direct proof of an agreement, and that the establishment of these facts is conclusive evidence of partnership.[53] The general rule is that either proof of an agreement to share,

[50] Bigelow v. Elliot, 1 Cliff. (U. S.) 28, Fed. Cas. No. 1399; Hendy v. March, 75 Cal. 566, 17 Pac. 702; Kingsbury v. Tharp, 61 Mich. 216, 28 N. W. 74; Howe v. Howe, 99 Mass. 71; Williams v. Lawrence, 47 N. Y. 462; Merritt v. Walsh, 32 N. Y. 685.

[51] Gibbs Estate, 157 Pa. 59, 27 Atl. 383, 22 L. R. A. 276; Edwards v. Tracy, 62 Pa. St. 374.

[52] Richardson v. Keely, 58 Colo. 47, 142 Pac. 167.

[53] Brown v. Higginbotham, 5 Leigh (Va.) 583, 27 Am. Dec. 618.

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or proof of an actual sharing, in profits and losses is sufficient proof of a partnership. The reason given for this is that the sharing, or the agreement to share, in profits and losses constitutes a partnership.[54]

§ 899. Sharing in profits, or profits and losses—Prima facie case.—Another class of cases establishes the rule that proof of an agreement to share, or proof of sharing in the profits, or the profits and losses of the business is prima facie evidence of a partnership. On this rule it was said by Mr. Story: "Admitting that a participation in the profits will ordinarily establish the existence of a partnership between the parties in favor of third persons in the absence of all opposing circumstances, it remains to be considered whether the rule ought to be regarded as anything more than presumptive proof thereof and liable to be repelled and overcome by other circumstances."[55] The same principle was stated by the Illinois Supreme Court as follows: "Where parties agree to share in the profits of a business, the law will infer a partnership between them in the business to which the agreement refers; but this presumption may be disproved. It is prima facie evidence and will control until rebutted."[56]

[54] Stafford v. Sibley, 113 Ala. 447, 21 So. 459; Hendy v. March, 75 Cal. 566, 17 Pac. 702; Fisher v. Sweet, 67 Cal. 228, 7 Pac. 657; Harris v. Hillegass, 54 Cal. 463; Robinson v. Compher, 13 Colo. App. 343, 57 Pac. 754; Bucknam v. Barnum, 15 Conn. 67; Gray v. Blasingame, 110 Ga. 343, 35 S. E. 653; Morse v. Richmond, 97 Ill. 303; Pierce v. Shippee, 90 Ill. 371; Mudd v. Bates, 73 Ill. App. 576; Uhl v. Harvey, 78 Ind. 26; Hart v. Hiatt, 2 Ind. Ter. 245, 48 S. W. 1038; Staples v. Sprague, 75 Maine 458; Funck v. Haskell, 132 Mass. 580; Getchell v. Foster, 106 Mass. 42; Kingsbury v. Tharp, 61 Mich. 216, 28 N. W. 74; Smith v. Walker, 57 Mich. 456, 22 N. W. 267, 24 N. W. 830, 26 N. W. 783; Baldwin v. Eddy, 64 Minn. 425, 67 N. W. 349.

[55] Story Partnership, § 38.

[56] Lockwood v. Doane, 107 Ill. 235; Niehoff v. Dudley, 40 Ill. 406; Illingworth v. Parker, 62 Ill. App. 650; Straus v. Kohn, 83 Ill. App. 497; Fourth Nat. Bank v. Altheimer, 91 Mo. 190, 3 S. W. 858; Gill v. Ferris, 82 Mo. 156; Philips v. Samuel, 76 Mo. 657; Campbell v. Dent, 54 Mo. 325; Roper v. Schaefer, 35 Mo. App. 30; Goddard &c. Co. v. Berry, 58 Mo. App. 665; Burnett v. Snyder, 81 N. Y. 550, 37 Am. Rep. 527; Kootz v. Tuvian, 118 N. Car. 393, 24 S. E. 776; Southern Fert. Co. v. Reames, 105 N. Car. 283, 11 S. E. 467. An agreement to share the profits and

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Ordinarily, in an agreement to share in the profits of a business or venture, where nothing is said about losses, it is held to amount prima facie to an agreement to share losses also, and consequently it was held that an agreement to share profits was prima facie an agreement for a partnership.[57] The prima facie case thus made by proof of an agreement to share in the profits may be overcome by proof showing that the profits were not received as such, but simply as a measure of compensation; but in the absence of any such rebutting evidence the prima facie case thus made becomes conclusive.[58] Proof that profits were received as compensation, and there was no sharing of losses, shows that one is not a partner.[59] An agreement to share losses so as to create a partnership need not be shown by express agreement, but may be inferred from other provisions of the partnership contract, the nature of the business, and the relation of the parties to it.[60] In an action by a creditor against partners to recover against the partnership and upon a note for loaned money executed in the name of the individual partner, in whose name the partnership business was conducted, it was held that the burden of the proof was upon the plaintiff to show that the money was borrowed for, or appropriated to the use of the firm, or that the name was in fact used to denote all of the partners.[61]

§ 900. Proof of sharing in profits and losses—Not conclusive.—There is another class of cases that holds that even proof of sharing or an agreement to share in the profits and losses is not conclusive evidence of the fact of partnership. This rule applies generally in cases involving controversies between the parties themselves or with a third person who had actual

losses of a venture is no more than prima facie evidence of partnership, and may be rebutted by proof of another agreement. Roberts v. Nunn (Tex. Civ. App.), 169 S. W. 1086.

[57] Straus v. Kohn, 83 Ill. App. 497; Illingworth v. Parker, 62 Ill. App. 650.

[58] Fourth Nat. Bank v. Altheimer, 91 Mo. 190, 3 S. W. 858; Roper v. Schaefer, 35 Mo. App. 30.

[59] Freeman v. Miller, 157 App. Div. 715, 142 N. Y. S. 797.

[60] Haswell v. Standring, 152 Iowa 291, 132 N. W. 417.

[61] Gernon v. Hoyt, 90 N. Y. 631; Bank of Rochester v. Monteath, 1 Den. (N. Y.) 402.

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knowledge of the partnership agreement, knew its terms and was familiar with the dealings of the partners among themselves.[62] In this class of cases the intention of the parties is controlling as gathered either from their agreement or their method of conducting the business. And where the contract is in writing the intention must be collected from the instrument itself, subject to the same rules of construction and interpretation as in the case of writings generally. In such cases courts will seek to ascertain and then enforce the intention of the parties.[63] The reason given as to why proof of sharing in profits and losses is not conclusive on the question of partnership is that such proof does not necessarily show that each partner is a principal as to the partnership and an agent as to the other partners. The authority of the several partners is held to be a necessary consequence of their community of interest and there is no partnership without it. It must be shown that each partner has the right "to make contracts, incur liabilities, manage the whole business, and dispose of the whole property of the partnership, for its purposes, in the same manner and with the same power as all the partners could when acting together."[64]

[62] Couch v. Woodruff. 63 Ala. 466; Lee v. Cravens, 9 Colo. App. 272, 48 Pac. 159; Snell v. De Land, 43 Ill. 323; Fawcett v. Osborn, 32 Ill. 411, 83 Am. Dec. 278; National Surety Co. v. T. B. Townsend Brick &c. Co., 74 Ill. App. 312; Dwinel v. Stone, 30 Maine 384; Banchor v. Cilley, 38 Maine 553; Canton Bridge Co. v. Eaton Rapids, 107 Mich. 613, 65 N. W. 761; Monroe v. Greenhoe, 54 Mich. 9, 19 N. W. 569; Connolly v. Davidson, 15 Minn. 519, 2 Am. Rep. 154; Clifton v. Howard, 89 Mo. 192, 1 S. W. 26, 58 Am. Rep. 97; Kellogg &c. Co. v. Farrell, 88 Mo. 594; McDonald v. Matney, 82 Mo. 358; Bank of Osceola v. Outhwaite, 50 Mo. App. 124; Baldwin v. Burrows, 47 N. Y. 199; Pattison v. Blanchard. 5 N. Y. 186; Osbrey v. Reimer, 49 Barb. (N. Y.) 265; Smith v. Wright, 5 Sandf. (N. Y.) 113; Morgan v. Stearns, 41 Vt. 398; Brigham v. Dana, 29 Vt. 1.

[63] Lee v. Wimberly, 102 Ala. 539, 15 So 444; Bestor v. Barker, 106 Ala. 240, 17 So. 389; Tayloe v. Bush, 75 Ala. 432; National &c. Co. v. Townsend &c. Co., 176 Ill. 156, 52 N. E. 938; Stevens v. Faucet, 24 Ill. 483; Chaffraix v. Lafitte, 30 La. Ann. 631; Canton Bridge Co. v. Eaton Rapids, 107 Mich. 613, 65 N. W. 761; Kellogg &c. Co. v. Farrell, 88 Mo. 594; Bank of Osceola v. Outhwaite, 50 Mo. App. 124.

[64] Berthold v. Goldsmith, 24 How. (U. S.) 536, 16 L. ed. 762; Lee v. Cravens, 9 Colo. App. 272, 48 Pac.

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§ 901. Liability to third persons—Proof.—Persons conducting a joint enterprise or business may be liable as partners to third persons when they are not in fact partners as between themselves. Persons have often been adjudged to be liable as partners as to third persons, when they could not be so regarded as between themselves.[65] Much less proof will suffice to establish the liability of partners to third persons than is required to show a partnership between themselves. Circumstances much less conclusive are sufficient to establish a partnership as to third persons.[66] It requires much more evidence to establish the existence

159; Winslow v. Young, 94 Maine 145, 47 Atl. 149; Braley v. Goddard, 49 Maine 115; Dwinel v. Stone, 30 Maine 384; Beecher v. Bush, 45 Mich. 188, 7 N. W. 785, 40 Am. Rep. 465; Ashby v. Shaw, 82 Mo. 76; Musser v. Brink, 68 Mo. 242; Bank of Osceola v. Outhwaite, 50 Mo. App. 124; Eastman v. Clark, 53 N. H. 276, 16 Am. Rep. 192; Cox v. Hickman, 8 H. L. Cas. 268, 9 C. B. (N. S.) 47, 30 L. J. C. P. 125, 7 Jur. (N. S.) 105, 8 Wkly. Rep. 754; Mollwo v. Court of Wards, L. R. 4 P. C. 419.

[65] Humphries v. McCraw, 5 Ark. 61; Olmstead v. Hill, 2 Ark. 346; Price v. Alexander, 2 Greene (Iowa) 427, 52 Am. Dec. 526; Stanchfield v. Palmer, 4 Greene (Iowa) 23; Champion v. Bostwick, 18 Wend. (N. Y.) 175, 31 Am. Dec. 376; Gill v. Kuhn, 6 S. & R. (Pa.) 333; Kellogg v. Griswold, 12 Vt. 291.

[66] Collyer Partnership, 89, 97; Letson v. Hall, 1 Ala. App. 619, 55 So. 944; Daugherty v. Heckard, 189 Ill. 239, 59 N. E. 569; Van Brunt v. Mather, 48 Iowa 503; Bissell v. Warde, 129 Mo. 439, 31 S. W. 928. For cases in which defendants have been held to be partners see Shackleford v. Williams, 182 Ala. 87, 62 So. 54; Letson v. Hall, 1 Ala. App. 619, 55 So. 944; Behrenfeld v. Breedlove (Cal. App.), 150 Pac. 71; Irvine & Muir Lumber Co. v. Holmes, 26 Cal. App. 453, 147 Pac. 229; Friese v. Simpson (Ga.), 84 S. E. 219; Swygert v. Bank of Haralson, 13 Ga. App. 640, 79 S. E. 759; Bredhoff v. Lepman, 181 Ill. App. 247; First Nat. Bank of Anna v. Rusk, 179 Ill. App. 574; Smith v. Hart, 179 Ill. App. 98; Elliot v. Swannell, 154 Ill. App. 570; Nichols v. Burcham, 177 Mich. 601, 143 N. W. 647; Wright v. Brooks, 47 Mont. 99, 130 Pac. 968; Taylor v. Steinman, 95 Nebr. 217, 145 N. W. 358; Clarke v. North, 135 N. Y. S. 422; Eilers Music House v. Reine, 65 Ore. 598, 133 Pac. 788; Mayer v. Wilson, 242 Pa. 473, 89 Atl. 685; Miller v. Laughlin (Tex. Civ. App.), 147 S. W. 711. For cases in which the evidence was insufficient to show partnership, see Kent v. Cobb, 24 Colo. App. 264, 133 Pac. 424; Miller v. Mitcham. 21 Idaho 741, 123 Pac. 941; Huger v. Ransom, 134 La. 696, 64 So. 682; Ellis v. Brand, 176 Mo. App. 383, 158 S. W. 705; Hurst v. Hayden, 94 Nebr. 704, 144 N. W. 162; First State Bank of Oldham v. Thompson, 32 S. Dak. 169, 142 N. W. 248.

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of a business partnership between a husband and wife where they deny its existence than between persons not married to each other.[67] But it seems to be the rule that partnership as to third persons may sometimes arise by operation of the law and even against the intention or consent of the parties. This may happen in either of two events: (1) Where the contract which the parties have entered into in law makes each the principal and agent of the other; (2) or by a course of dealing they have shown that such was the real relation between the parties.[68] There are two ways in which a person may become liable to third parties: (1) As an actual partner by express agreement; (2) by permitting himself to be held out to the public as a partner, by the use of his name as a member of the firm.[69] In the first case he is liable on all contracts made by any member of the firm in the partnership name and coming within the partnership business.[70] In the class of cases coming within the latter condition he is liable for all debts contracted within the scope of the partnership business by persons who deal with the firm in the faith of this fact, and in reasonable reliance upon the honest belief of the authority of the contract of the partner to bind the firm.[71] A partnership which will render the partners liable to third persons may be proved by circumstantial evidence.[72] A person who is

[67] Sartori v. Pozzi, 20 Cal. App. 252, 128 Pac. 755; Kent v. Cobb, 24 Colo. App. 264, 133 Pac. 424; B. A. Railton Co. v. Huntington, 169 Ill. App. 616; Ramsey v. Carr, 168 Ill. App. 379; In re McDonald's Estate (Iowa), 149 N. W. 897; Ratke v. Rinker, 117 Md. 289, 83 Atl. 251; Swift v. Scott, 181 Mo. App. 1, 163 S. W. 538; A. Graf Distilling Co. v. Wilson, 172 Mo. App. 612, 156 S. W. 23; Blodgett v. Inglis, 63 Wash. 513, 115 Pac. 1043, Ann. Cas. 1912 D, 622n.

[68] Morgan v. Farrel, 58 Conn. 413, 20 Atl. 614, 18 Am. St. 282; Citizens' Nat. Bank v. Hine, 49 Conn. 236; Parker v. Canfield, 37 Conn. 250, 9 Am. Rep. 317.

[69] Alabama &c. Co. v. Reynolds, 85 Ala. 19, 4 So. 639.

[70] Alabama &c. Co. v. Reynolds, 79 Ala. 497; Clark v. Taylor, 68 Ala. 453.

[71] Owensboro &c. Co. v. Bliss, 132 Ala. 253, 31 So. 81, 90 Am. St. 907; Tanner &c. Co. v. Hall, 86 Ala. 305, 5 So. 584; Alabama &c. Co. v. Reynolds, 85 Ala. 19, 4 So. 639; Humes v. O'Bryan, 74 Ala. 64; Nicholson v. Moog, 65 Ala. 471; Webb v. Johnson, 95 Mich. 325, 54 N. W. 947; Hinman v. Littell, 23 Mich. 484; Mershon v. Hobensack, 22 N. J. L. 372.

[72] Humphries v. McCraw, 5 Ark. 61; Miller v. Laughlin (Tex. Civ. App.), 147 S. W. 711.

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not a partner in fact may become so by operation of law at the suit of a creditor when he is benefited by the profits of the partnership and takes from the creditors a part of the fund on which they place reliance for the payment of their debts.[73] Evidence that a plaintiff, who assisted at an operation on defendant, and another doctor who performed it, occupied the same house, is not sufficient to establish partnership between them, and make out the defense that they were partners, and that the other doctor having been paid, the plaintiff could not recover for his services.[74] Very little evidence is necessary to bind persons as partners in their relations to creditors.[75] Evidence that two persons engaged in business under a firm name composed of their names and the word company, and that the profits were to be divided between them in certain proportions, although one of them furnished the whole capital, warranted the jury in finding a trading partnership.[76] In an action to charge stockholders of a de facto corporation as partners there must be shown knowledge of defects in incorporation or intention to act as partners,[77] and stockholders who contracted believing they were binding their corporation must be shown to have represented themselves as partners before being held liable as such.[78] It may be shown in attachment proceedings that prior attaching creditors were secret partners in the debtor firm.[79] But in an action against members of a "Farmers' Co-operative League" they were not held partners where neither the sharing of profits, nor an intention to become partners was shown.[80]

§ 902. Suits between partners—Proof.—As has heretofore been shown, a different rule applies in determining partner-

[73] Pitkin v. Pitkin, 7 Conn. 307, 18 Am. Dec. 111; New Orleans v. Gauthreaux, 32 La. Ann. 1126.

[74] Epstein v. Hugel, 138 N. Y. S. 1072.

[75] Swygert v. Bank of Haralson, 13 Ga. App. 640, 79 S. E. 759.

[76] Phipps v. Little, 100 N. E. 615, 213 Mass. 414.

[77] Magnolia Shingle Co. v. J. Zimmern's Co., 3 Ala. App. 578, 58 So. 90.

[78] United States Wood Preserving Co. v. Lawrence (Conn.), 95 Atl. 8.

[79] Josselson v. Butler, 162 Ky. 229, 172 S. W. 503.

[80] Willoughby v. Hildreth, 182 Mo. App. 80, 167 S. W. 639.

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ship relations between partners and third persons, and between the partners themselves. As between the partners, or alleged partners, and the third persons, actual partnership need not necessarily be shown in order to hold the alleged partner to partnership liability. As between the alleged partners themselves, however, the actual existence of the partnership must be shown by clear proof thereof.[81] The existence of a partnership need not however be proven by direct evidence, but may be implied from circumstances.[83] As in other cases, partnership can not be established by the declarations of one of the alleged partners, except as to himself.[84] The courts will not proceed on conjecture, but strict proof will be required as to the existence of the partnership.[85] The statements and acts of an alleged partner may be introduced to prove the existence of the partnership, in a proper case, and a Michigan case holds that evidence of statements of a decedent

[81] Black v. Henry G. Allen Co., 56 Fed. 764; Watson v. Hamilton, 180 Ala. 3, 60 So. 63; Denison v. Keiser, 104 Ark. 94, 148 S. W. 1023; Reynolds v. Jackson, 25 Cal. 490, 144 Pac. 305; Jones v. Purnell, 62 Pennew. (Del.) 444, 62 Atl. 149; Davis v. Savannah Lumber Co., 11 Ga. App. 610, 75 S. E. 986; Olson v. Michener, 158 Iowa 338, 138 N. W. 826; Crawford v. Wiedemann, 159 Ky. 18, 166 S. W. 595; Graham v. Swann, 148 Ky. 608, 147 S. W. 11; Busbey v. Hamiter, 131 La. 118, 59 So. 35; Abadie v. Frechede, 22 La. Ann. 423; Gover v. Hall, 3 Harr. & J. (Md.) 43; Miller v. Casey, 176 Mich. 221, 142 N. W. 589; Groth v. Payment, 79 Mich. 290; Smith v. Shotliff, 169 Mo. App. 66, 154 S. W. 177; Boon v. Turner, 96 Mo. App. 635, 70 S. W. 916; Lenahan v. Casey, 46 Mont. 367, 128 Pac. 601; Arnold v. Sinclair, 12 Mont. 248, 29 Pac. 1124; Donahue v. Hanighen, 96 Nebr. 180, 147 N. W. 464; Osborne v. Fitzgerald, 26 Nebr. 514, 42 N. W. 418; Sargent v. Collins, 3 Nev. 260; Gordon v. Farrell, 157 App. Div. 409, 142 N. Y. S. 491; Burkardt v. Walsh, 49 App. Div. 634, 64 N. Y. S. 779; Nicholson v. Kilbury, 83 Wash. 196, 145 Pac. 189; McDonald v. Edgcomb, 68 Wash. 393, 123 Pac. 525; Lantz v. Tumlin, 74 W. Va. 196, 81 S. E. 820; Goss v. Lanin (Iowa), 152 N. W. 43; Bettinger v. Bettinger (Iowa), 150 N. W. 1025; Stillman v. Lefferts (Iowa), 82 N. W. 491; Brown v. Brown, 175 Mich. 442, 141 N. W. 553; Kruse v. Tripp, 129 Minn. 252, 152 N. W. 538; Chapin v. Cherry, 243 Mo. 375, 147 S. W. 1084; Simpson v. Gernandt (Nebr.), 152 N. W. 549; Richardson v. Wilson (Tex. Civ. App.), 178 S. W. 566; Radcliffe v. Rushworth, 33 Beav. 484. See ante § 877 et seq.

[83] Nicholson v. Kilbury, 83 Wash. 196, 145 Pac. 189.

[84] Akers v. Lord, 67 Wash. 179, 121 Pac. 51.

[85] Baker v. Baker, 161 Ill. App. 430.

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as to what he had already done with his business is admissible in a suit concerning the right of another to carry it on as a partner.[86] In a suit between plaintiff and defendant, as to whether or not they were partners, the fact that defendant, after severance of his business relations with plaintiff, on being sued as an individual by a third person made an affidavit of defense individually, is no evidence thereof.[87] That plaintiff gave notes to defendant, secured by trust deed, on certain property, does not preclude plaintiff from showing that the property belonged to them as partners, and that the notes and trust deed were but part of the agreed plan between them to put the ostensible title in plaintiff, while defendant was to be a dormant partner.[88] In an action for an accounting between partners, the court, in case of doubt as to the existence of the partnership, may consider the acts and conduct of the parties at the time of and subsequent to the date of the contract.[89] It has been held, however, that general remarks occurring in a conversation between two or more parties regarding a business proposition are not sufficient evidence of a partnership agreement.[90] It has been held that under certain conditions, statements by defendant that the complainant had an interest in an enterprise and was entitled to share in the profits, are not necessarily conclusive of such question.[91] In short, a prima facie case of partnership is made out by evidence that persons are sharing profits, pursuant to agreement; that they have described themselves as partners, or that they are the common proprietors of a business conducted for mutual profit.[92] This rule applies in all classes of partnership actions as well as between the partners themselves, but, being only presumptive, may be rebutted by proper evidence. It probably applies most strongly in cases where the partners are sued by a third person,

[86] Howard v. Patrick, 43 Mich. 121, 5 N. W. 84.

[87] Ryder v. Jacobs, 196 Pa. St. 386, 49 Atl. 667.

[88] Short v. Taylor, 137 Mo. 517, 38 S. W. 952, 59 Am. Rep. 508.

[89] Wright v. Amann, 192 Fed. 649.

[90] Chapin v. Cherry, 243 Mo. 375, 147 S. W. 1084.

[91] McDonald v. Edgcomb, 68 Wash. 393, 123 Pac. 525.

[92] Cobb v. Martin, 32 Okla. 588, 123 Pac. 422.

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and least strongly as between the partners themselves. Uncontroverted evidence that the defendant held the plaintiff out as a partner, and received from him cash and credits used in the business, has been held to sustain a finding of a partnership.[93] Where it was proved that the defendant had paid all the expenses of the business, and there was no proof as to a certificate of partnership, or that any account of inventory had been taken, the defendant's positive testimony that no partnership agreement existed was sufficiently supported.[94] In an action for accounting, it was held that a book of entry and admissions by the defendant were sufficient to corroborate plaintiff's testimony as to the existence of a partnership.[95] It has been held that uncontradicted declarations by a defendant that the plaintiff had an interest in an enterprise, and a right to share in the profits, was not conclusive on such question.[96]

§ 903. Suits against third persons—Proof.—In a suit by partners, or where a defense is set up that an obligation is that of a partnership and not of an individual, the evidence of partnership need only be sufficient to prove material allegations in ordinary civil actions.[97] It has been said, however, evidence must be exceptionally clear to support allegations of a general partnership.[98] In an action by partners to recover a partnership demand, the partnership may be proved by oral testimony of clerks or other persons who knew that the alleged partners actually carried on the business in partnership.[99] A partnership

[93] Shadburne v. Sbarbaro, 182 Ill. App. 54.

[94] Simpson v. Gernandt (Nebr.), 152 N. W. 549.

[95] Trainor v. Robyn, 164 Iowa 508, 146 N. W. 450.

[96] McDonald v. Edgcomb, 68 Wash. 393, 123 Pac. 525.

[97] Mullins v. Gilligan, 12 Colo. App. 13, 54 Pac. 1106; Davis v. White, 1 Houst. (Del.) 228; Agnew v. Omaha Nat. Bank, 69 Nebr. 654, 96 N. W. 189; North v. Bloss, 30 N. Y. 374; Adler v. Cloud, 42 S. Car. 272, 20 S. E. 393; Gregg v. Willis, 71 Vt. 313, 45 Atl. 299; Willey v. Crocker-Woolworth Nat. Bank, (Cal.) 72 Pac. 832 (revd. 141 Cal. 508, 75 Pac. 106); Ex parte Benefield, 5 Ves. Jr. 424.

[98] Gray v. Palmer, 9 Cal. 616.

[99] Lockridge v. Wilson, 7 Mo. 560.

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may be proved in an action against third persons by evidence that each partner admitted its existence.[1]

§ 904. Intention.—Intention has, as we have seen heretofore, been held to be a leading test of partnership. It has been held that testimony of one partner that he did not intend to become a partner, or as to what his purpose was in the business relation he had with his codefendant is not material, except as it relates to specific acts or conduct, and then only so far as such acts or conduct, as qualified by the motive or intent, affect the credibility of his denial that he was interested with his codefendant.[2] This should not be taken too literally. The true reason for the holding in the above case was that partnership liability could there be shown by holding out. There are many cases holding that the intention of the parties is the true test,[3] and that such intent may be inferred from the acts, words and conduct of the parties sought to be charged as partners.[4] It is held that in determining the existence of a partnership, if the agreement is partly in writing, partly oral, and partly evidenced by conduct only, all the things done by the parties in connection with the common purpose should be considered.[5] In case the question arises between the partners themselves, the intention of all parties, if the same, should govern. Moreover, if the intention of the various partners differed, and there was some ambiguity in the contract as to the relations created, certain conditions might arise where the contract would be of no effect, for want of mutuality. As said in one case,[6] "for whether the existence of certain facts shall constitute a partnership depends upon the intention of the parties interested, as between themselves." Two persons being sued as partners in a certain transaction, and one alleging no partner-

[1] Swygert v. Bank of Haralson, 13 Ga. App. 640, 79 S. E. 759.

[2] Griffin v. Carr, 165 N. Y. 62[1], 59 N. E. 1123.

[3] See ante §§ 87, 88, 89.

[4] Richardson v. Keely, 58 Colo. 47, 142 Pac. 167; Smith v. Hart, 179 Ill. App. 98. See ante § 887.

[5] Irvine & Muir Lumber Co. v. Holmes, 26 Cal. App. 453, 147 Pac. 229.

[6] Macy v. Combs, 15 Ind. 469, 77 Am. Dec. 103.

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ship, it is not competent to introduce an agreement between the parties, showing their relations in another matter.[7]

§ 905. Proof by holding out.—Under the rule stated in the preceding section persons may be held liable as partners to third persons when they are not in fact partners as among themselves. A very common method by which a person is held liable as a member of a firm is by evidence showing that the firm has held him out to the public as a partner. It is very clear that one who holds himself, or permits himself to be held by the firm, out to the public as a partner, and thereby obtains credit himself or gives credit to the firm, will be held liable as a partner though he is not in fact.[8] The rule was stated by the Supreme Court of Illinois thus: "Parties may so conduct themselves as to be liable to third persons as partners, when, in fact, no partnership exists as between themselves. The public are authorized to judge from appearances and professions, and are not absolutely bound to know the real facts, while the certain truth is positively known to the alleged parties to a firm."[9] This rule was thus stated by the Minnesota Supreme Court: "Parties will be held prima facie to be partners as to creditors upon slighter proof than is necessary to establish that relation among themselves. In such cases, representations, conduct, and circumstances naturally calculated and likely to induce the belief that the parties

[7] Kimball v. Longstreet, 174 Mass. 487, 55 N. E. 177.

[8] Buckingham v. Burgess, 3 McLean (U. S.) 364, Fed. Cas. No. 2087; Benedict v. Davis, 2 McLean (U. S.) 347, Fed. Cas. No. 1293; Shackleford v. Williams, 182 Ala. 87, 62 So. 54; Vittitow v. McKinney, 99 Ark. 602, 139 S. W. 544; Campbell v. Hastings, 29 Ark. 512; Ellison v. Stuart, 2 Penew. (Del.) 179, 43 Atl. 836; Carmichael v. Greer, 55 Ga. 116; Dailey v. Coons, 64 Ind. 545; Hancock v. Hintrager, 60 Iowa 374, 14 N. W. 725; Woodward v. Clark, 30 Kans. 78, 2 Pac. 106; Burbank v. Haas, 9 La. Ann. 528; Rice v. Barrett, 116 Mass. 312; McCarthy v. Nash, 14 Minn. 127; Wood v. Cullen, 13 Minn. 394; Gates v. Watson, 54 Mo. 585; Young v. Smith, 25 Mo. 341; Shafer v. Randolph, 99 Pa. St. 250; Downie v. Savage, 72 Wash. 164, 129 Pac. 1096; Wagner v. Buttles, 151 Wis. 658, 139 N. W. 425; In re McDonald (Iowa), 149 N. W. 897; Shumaker Partnership, §§ 35-37. See also United States Wood Preserving Co. v. Lawrence (Conn.), 95 Atl. 8.

[9] Daugherty v. Heckard, 189 Ill. 239, 59 N. E. 569; Phillips v. Phillips, 49 Ill. 437.

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were partners are competent. Of necessity, this evidence must be largely circumstantial."[10]

§ 906. Proof by holding out—Nature and degree.—No absolute rule can be given as to the quantity or degree of proof necessary in such cases. But in such cases it is not necessary to prove an actual existing partnership between the persons sought to be charged. An apology for a general rule may be found in the statement that the proof is sufficient to render a party liable as a partner when it shows that he so acted and conducted himself toward the public as to induce a reasonable person to deal with him in the honest belief that the partnership really existed.[11] In such cases it is not necessary to prove that the party holding himself out as a partner shares in the profits or losses, as this can in no way affect the person acting on the belief that he is in fact a member of the firm.[12] Mr. Lindley states that in order to render a person liable on the ground that he has been held out as a partner two things must appear: (1) The act of holding out must have been done either by him or with his consent; (2) it must have been known to the person seeking to hold him liable. The reasons for this are stated thus: "In the absence of the first of these requisites, whatever may have been done, can not be imputed to the person sought to be made liable. And in the absence of the second, the person seeking to make him liable has not in any way been misled."[13]

§ 907. Proof by holding out—Estoppel.—The liability of a person thus held out is on the doctrine of estoppel and the proof must show all the elements sufficient to constitute the estoppel.[14] So, the proof must show that the acts, conduct or admis-

[10] Rosenbaum v. Howard, 69 Minn. 41, 71 N. W. 823.

[11] Rimel v. Hayes, 83 Mo. 200; Fletcher v. Pullen, 70 Md. 205, 16 Atl. 887, 14 Am. St. 355.

[12] Brown v. Leonard, 2 Chitty 120, 23 Rev. Rep. 744; Kirkwood v. Cheetham, 2 Fost. & F. 798, 10 Wkly. Rep. 670; Hardman v. Booth, 1 Hurlst. & C. 803, 32 L. J. Ex. 105, 9 Jur. (N. S.) 81, 7 L. T. 638, 11 Wkly. Rep. 239; Ex parte Watson, 19 Ves. 459.

[13] 1 Lindley Partnership, p. 43 (57).

[14] Marble v. Lypes, 82 Ala. 322, 2 So. 701; Wise v. Williams, 72 Cal. 544, 14 Pac. 204; Bowie v. Maddox, 29 Ga. 285, 74 Am. Dec. 61; Poole v.

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sions relied upon to constitute the holding out must have been before credit was given or the contract entered into.[15] The liability of the person claimed to have been held out can only extend to such persons as are thereby led to believe that he is in fact a partner and who gave credit to the firm upon such belief.[16]

§ 908. Proof by holding out—Acts constituting an estoppel.—The holding out of a person as a partner may be sufficiently shown by proof of his conduct, conversation, admissions or use of his name, or any and all facts and circumstances either showing or tending to show that the contract was executed or credit extended to the firm under the reasonable belief that the party sought to be charged was in fact a member of the firm.[17] The same rules apply where a person permits one or more other

Fisher, 62 Ill. 181; Uhl v. Harvey, 78 Ind. 26; Sherrod v. Langdon, 21 Iowa 518; Fletcher v. Pullen, 70 Md. 205, 16 Atl. 887, 14 Am. St. 355; Cirkel v. Croswell, 36 Minn. 323, 31 N. W. 513; Bissell v. Warde, 129 Mo. 439, 31 S. W. 928; Eastman v. Clark, 53 N. H. 276, 16 Am. Rep. 192; Poillon v. Secor, 61 N. Y. 456; Reber v. Columbus &c. Co., 12 Ohio St. 175; Lancaster &c. Bank v. Boffenmyer, 162 Pa. St. 559, 29 Atl. 855; Drennen v. House, 41 Pa. 30; French v. Barron, 49 Vt. 471; Moore v. Harper, 42 W. Va. 39, 24 S. E. 633.

[15] Knard v. Hill, 102 Ala. 570, 15 So. 345; Morgan v. Farrel, 58 Conn. 413, 20 Atl. 614, 18 Am. St. 282; Webster v. Clark, 34 Fla. 637, 16 So. 601, 27 L. R. A. 126, 43 Am. St. 217; Palmer v. Pinkham, 37 Maine 252; Fletcher v. Pullen, 70 Md. 205, 16 Atl. 887, 14 Am. St. 355; Van Kleeck v. McCabe, 87 Mich. 599, 49 N. W. 872, 24 Am. St. 182; Hahlo v. Mayer, 102 Mo. 93, 13 S. W. 804, 15 S. W. 750, 22 Am. Rep. 753; Howes v. Fiske, 67 N. H. 289, 30 Atl. 351; Cornhauser v. Roberts, 75 Wis. 554, 44 N. W. 744; Baird v. Planque, 1 Fost. & Fin. 344.

[16] Thompson v. First Nat. Bank, 111 U. S. 529, 28 L. ed. 507, 4 Sup. Ct. 689; Benedict v. Davis, 2 McLean (U. S.) 347, Fed. Cas. No. 1293; Bowie v. Maddox, 29 Ga. 285, 74 Am. Dec. 61; Wood v. Pennell, 51 Maine 52; Fitch v. Harrington, 13 Gray (Mass.) 468, 74 Am. Dec. 641; Willoughby v. Hildreth, 182 Mo. App. 80, 167 S. W. 639.

[17] McCaskey v. Pollock, 82 Ala. 174, 2 So. 674; Campbell, v. Hastings, 29 Ark. 512; Carmichael v. Greer, 55 Ga. 116; Dailey v. Coons, 64 Ind. 545; Fletcher v. Pullen, 70 Md. 205, 16 Atl. 887, 14 Am. St. 355; Rice v. Barrett, 116 Mass. 312; Cirkel v. Croswell, 36 Minn. 323, 31 N. W. 513; Miles v. Wann, 27 Minn. 56, 6 N. W. 417; Pringle v. Leverich, 48 N. Y. Super. 90; Reber v. Columbus &c. Mfg. Co., 12 Ohio St. 175; Harris v. Sessler, 67 Tex. 383, 3 S. W. 316; Moore v. Harper, 42 W. Va. 39, 24 S. E. 633.

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persons to hold him out as a partner, and credit is thereby procured on the strength of his supposed relation. He may be held liable as a partner by any one who thus lends credit to the firm. But in this class of cases the proof must generally show that the person sought to be charged had knowledge that he was in fact held out, but this may be shown either by facts or circumstances from which notice to him can be imputed.[18] So where a partnership becomes incorporated but continues the use of the firm books and the various running accounts are continued without break, it was held in an action by a creditor who had sold goods and charged them to the firm that the partners were estopped to set up the incorporation as a defense to the action.[19] Though letterheads used with knowledge of one whom it is sought to hold as a partner may be evidence of the existence of the partnership, yet unless such person was held out by them as a partner, and another acts on the faith of them, they do not create an estoppel.[20] Where one sold goods for a corporation under a contract by which he received half the profits for his services, and he also bought goods from the plaintiff in the name of S & Co., in which he was doing business, and sold goods, taking notes in payment, and also took title notes on sales of some of the goods of the corporation, and some of the goods bought from plaintiff, payable to the corporation, from which he received credit from the corporation, but there was no evidence that the plaintiff knew of the contract with the corporation, or that the corporation held itself out to the plaintiff as a partner, it was held that the evidence was not sufficient to charge the corporation as a partner on a note executed by S for goods purchased from the plaintiff.[21]

[18] Swann v. Sanborn, 4 Woods (U. S.) 625, Fed. Cas. No. 13675; Jewett, In re, 7 Biss. (U. S.) 328, Fed. Cas. No. 7306; Hess v. Ferris, 57 Ill. App. 37; Hinman v. Littell, 23 Mich. 484; Crook v. Davis, 28 Mo. 94; Hicks v. Cram, 17 Vt. 449.

[19] Reid v. Kreling, 125 Cal. 117, 57 Pac. 773.

[20] American Cotton College v. Atlanta Newspaper Union, 138 Ga. 147, 74 S. E. 1084.

[21] American Seeding Mach. Co. v. John Conklin's Sons Co., 64 Misc. 652, 120 N. Y. S. 592.

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§ 909. Partnership liability by estoppel—Uniform Partnership Act.—The Uniform Partnership Act lays down certain rules as to partnership liability by estoppel, which will largely govern the admission of evidence to show such liability under that act. Section 16 provides: "(1) When a person, by words spoken or written or by conduct, represents himself, or consents to another representing him to any one, as a partner in an existing partnership or with one or more persons not actual partners, he is liable to any such person to whom such representation has been made, who has, on the faith of such representation, given credit to the actual or apparent partnership, and if he has made such representation or consented to its being made in a public manner, he is liable to such person, whether the representation has or has not been made or communicated to such person so giving credit by or with the knowledge of the apparent partner making the representation or consenting to its being made: (a) When a partnership liability results, he is liable as though he were an actual member of the partnership; (b) when no partnership liability results, he is liable jointly with the other persons, if any, so consenting to the contract or representation as to incur liability, otherwise separately. (2) When a person has been thus represented to be a partner in an existing partnership, or with one or more persons not actual partners, he is an agent of the persons consenting to such representation to bind them to the same extent and in the same manner as though he were a partner in fact, with respect to persons who rely upon the representation. Where all the members of the existing partnership consent to the representation, a partnership act or obligation results; but in all other cases it is the joint act or obligation of the person acting and the persons consenting to the representation."

§ 910. Proof by reputation.—The authorities are practically unanimous in holding that proof of general reputation is not, ordinarily, admissible for the purpose of establishing part-

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nership.[22] The reason usually given for excluding such evidence is that it is hearsay,[23] and does not fall within any exception to the rule excluding hearsay evidence. An Arkansas case holds that, on the issue as to whether a business was carried on by defendants as partners, evidence of what is universally understood as to the business relations of defendants is incompetent.[24] Delaware has some apparently conflicting decisions upon the question.[25] One case decided in 1893, holds that general reputation that two persons are partners can not be rebutted by specific acts, *but only by general reputation in reply.* This would indicate that the testimony showing general reputation was admissible. Another Delaware case, decided the following year, held very clearly that testimony of general reputation is not admissible to charge a person as a partner of a firm.[26] Nor is proof

[22] Wilson v. Codman, 3 Cranch (U. S.) 193, 2 L. ed. 408; Owensboro Wagon Co. v. Bliss, 132 Ala. 253, 31 So. 81, 90 Am. St. 907; Marble v. Lypes, 82 Ala. 322, 2 So. 701; Carter v. Douglass, 2 Ala. 499; Stiewel v. Borman, 63 Ark. 30, 37 S. W. 404; Campbell v. Hastings, 29 Ark. 512; Sinclair v. Wood, 3 Cal. 98; Butte &c. Co. v. Wallace, 59 Conn. 336, 22 Atl. 330; Brown v. Crandall, 11 Conn. 92; Tumlin v. Goldsmith, 40 Ga. 221; Bowen v. Rutherford, 60 Ill. 41, 14 Am. Rep. 25; Joseph v. Fisher, 4 Ill. 137; Macy v. Combs, 15 Ind. 469, 77 Am. Dec. 103; Earl v. Hurd, 5 Blackf. (Ind.) 248; Brown v. Rains, 53 Iowa 81, 4 N. W. 867; Southwick v. McGovern, 28 Iowa 533; Graham v. Swann, 148 Ky. 608, 147 S. W. 11; Marks v. Hardy, 117 Ky. 663, 4 Ann. Cas. 815; Scott v. Blood, 16 Maine 192; Bryden v. Taylor, 2 Har. & J. (Md.) 396, 3 Am. Dec. 554; Goddard v. Pratt, 16 Pick. (Mass.) 412; Sager v. Tupper, 38 Mich. 258; Lockridge v. Wilson, 7 Mo. 560; Hersom v. Henderson, 23 N. H. 498; Grafton Bank v. Moore, 13 N. H. 99, 38 Am. Dec. 478; Adams v. Morrison, 113 N. Y. 152, 20 N. E. 829; Halliday v. McDougall, 20 Wend. (N. Y.) 81; Smith v. Griffith, 3 Hill (N. Y.) 333, 38 Am. Dec. 639; Inglebright v. Hammond, 19 Ohio 337, 53 Am. Dec. 430; Farmers' Bank v. Saling, 33 Ore. 394, 54 Pac. 190; Carlton v. Coffin, 27 Vt. 496; Hicks v. Cram, 17 Vt. 449; Gay v. Fretwell, 9 Wis. 186; Emberson v. McKenna, 4 Willson Tex. App. Civ. Cas., § 94, 16 S. W. 419; Holman v. Herscher (Tex.), 16 S. W. 984; Buzzard v. Jolly (Tex.), 6 S. W. 422.

[23] Marble v. Lypes, 82 Ala. 323, 2 So. 701; Hicks v. Cram, 17 Vt. 449; Wallis v. Wood (Tex.), 7 S. W. 852; Central R. Co. v. Smith, 76 Ala. 572, 52 Am. Rep. 353; Brown v. Crandall, 11 Conn. 92; Earl v. Hurd, 5 Blackf. (Ind.) 248; Bowen v. Rutherford, 60 Ill. 41, 14 Am. Rep. 25.

[24] Stiewel v. Borman, 63 Ark. 30, 37 S. W. 404.

[25] Deputy v. Harris, 1 Marv. (Del.) 100, 40 Atl. 714.

[26] Grier v. Deputy, 1 Marv. (Del.) 19, 40 Atl. 716.

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of such general reputation sufficient to shift the burden of proof.[27] It seems to have been held that such reputation is admissible where it is made to appear by the proof that the debt sued for was contracted because of the notoriety acquired by the firm and that the contract or debt related to the particular business.[28] And it has been held admissible in corroboration or to show knowledge, on the theory that if the community generally understands and believes one to be a partner it tends to prove that his acts and conduct have been such as naturally, fairly, and reasonably support such a belief.[30] But some cases deny its admissibility in corroboration, on the ground that if the other evidence is insufficient to establish a partnership then the party bound to establish it must fail, and can not supply the defect by proof of general reputation.[31] So it has been held admissible if it appears to arise from the acts of the partner sought to be charged,[32] or if he knowingly permitted it to be reputed he was a partner,[33] and a general reputation as to the continuance of a partnership after dissolution has been admitted.[34] It was also held admissible in connection with evidence that such report or reputation was known to the parties sought to be charged, as showing that they knew they were held out as partners.[35] So, evidence of persons residing near the place where the partnership business was trans-

[27] Taylor v. Webster, 39 N. J. L. 102.

[28] Tanner v. Hall, 86 Ala. 305, 5 So. 584.

[30] Turner v. McIlhany, 6 Cal. 287; Gilpin v. Temple, 4 Harr. (Del.) 190; Rizer v. James, 26 Kans. 221; Cross v. Burlington Nat. Bank, 17 Kans. 336; Bernard v. Torrance, 5 Gill & J. (Md.) 383; Parshall v. Fisher, 43 Mich. 529, 5 N. W. 1049; Gulick v. Gulick, 14 N. J. L. 578; Allen v. Rostrain, 11 S. & R. (Pa.) 362; Gay v. Fretwell, 9 Wis. 186.

[31] Adams v. Morrison, 113 N. Y. 152, 20 N. E. 829.

[32] Gilpin v. Temple, 4 Harr. (Del.) 190.

[33] Benjamin v. Covert, 47 Wis. 375, 2 N. W. 625.

[34] Coggswell v. Davis, 65 Wis. 191, 26 N. W. 557.

[35] Campbell v. Hastings, 29 Ark 512; Gaffney v. Hoyt, 2 Idaho 199, 10 Pac. 34. See also Southwick v. McGovern, 28 Iowa 533, and Butte Hardware Co. v. Wallace, 59 Conn. 336, 22 Atl. 330.

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acted as to their understanding as to the persons who composed the firm has been held admissible.[36]

§ 911. **Partnership in individual name.**—The business of a partnership is sometimes conducted in the name of a single individual. In such case the same rules of proof apply in order to bind the other partner as in cases to prove the members of a partnership generally. Evidence of participation in profits, management of the business, dealings in other instances, declarations or admissions, together with circumstances which would reasonably raise the inference of partnership is sufficient.[37] And where the particular business is carried on in the name of an individual partner, and a note is given in such name for borrowed money, it is held that in order to recover against the partners the plaintiff must prove that the money for which the note was given was borrowed on the credit of the partnership, or that it was used in the business or for the benefit of the partnership. The presumption in such case is that the debt is the debt of the individual who executed the note.[38]

§ 912. **Admissibility of partnership books—Generally.**—The admissibility of partnership books is very seldom determined by the doctrine or rule of entries in regular course of business. But such books are usually kept in the course of business and are therefore similar to most of those considered as coming within the rule that entries made in due course of business are admissible after the death of the party making them. Entries in partnership books in the usual course of business are generally admissible in favor of third persons in actions against the partners as admissions of such partners,[39] and this is true even as against

[36] Parshall v. Fisher, 43 Mich. 529, 5 N. W. 1049.

[37] Palmer v. Stephens, 1 Den. (N. Y.) 471; Bank of Rochester v. Monteath, 1 Den. (N. Y.) 402; Burnley v. Rice, 18 Tex. 481.

[38] Horton v. Miller, 84 Ala. 537, 4 So. 370; Snead v. Barringer, 1 Stew. (Ala.) 134; Hermann v. Louisiana State Ins. Co., 8 La. 285; Fosdick v. Van Horn, 40 Ohio 459.

[39] Kahn v. Boltz, 39 Ala. 66; New Haven &c. Co. v. Goodwinn, 42 Conn. 230; Agricultural Ins. Co. v. Keeler, 44 Conn. 161; Perry v. Butt, 14 Ga. 699; Eden v. Lingenfelter, 39 Ind. 19; succession of Magi, 107 La. Ann. 208, 31 So. 660; Calder v. Creditors,

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special or dormant partners who had access to the books.[40] So, as a general rule, partnership books are admissible for and against each partner as between themselves to show the state of the partnership affairs, and the like;[41] but if a partner had no access to the books and was deprived of an opportunity to examine them, the rule does not apply and this not infrequently happens in the case of a special or dormant partner or in the case of entries by a liquidating or surviving partner;[42] nor are alleged partnership books, ordinarily, admissible of themselves to prove or disprove the partnership.[43] The rules as to the admissibility of entries made in regular course of business are substantially the same, no matter whether the books are books kept by a partnership or an individual merchant or dealer, and no matter whether the entries were made by a partner or a bookneeper.[44] In Georgia it has

47 La. Ann. 346, 16 So. 852; Grant v. Masterton, 55 Mich. 161, 20 N. W. 885; Daniels v. Fowler, 123 N. Car. 25, 31 S. E. 598; Hartley v. Weideman, 175 Pa. St. 309, 34 Atl. 625.

[40] Chick v. Robinson, 95 Fed. 619, 37 C. C. A. 205, 52 L. R. A. 833, and note; First Nat. Bank v. Huber, 75 Hun 80, 58 N. Y. St. 160, 26 N. Y. S. 961.

[41] Glover v. Hembree, 82 Ala. 324, 8 So. 251; Haller v. Willamowicz, 23 Ark. 566; Peden v. Mail, 118 Ind. 560, 20 N. E. 446; Reno v. Crane, 2 Blackf. (Ind.) 217; Hunter v. Aldrich, 52 Iowa 442, 3 N. W. 574; Meguiar v. Helm, 91 Ky. 19, 14 S. W. 949, 12 Ky. L. 751; Carpenter v. Camp, 39 La. Ann. 1024, 3 So. 269; Sangston v. Hack, 52 Md. 173; Topliff v. Jackson. 12 Gray (Mass.) 565; Dunnell v. Henderson, 23 N. J. Eq. 174; Godfrey v. Templeton, 86 Tenn. 161, 6 S. W. 47; Faver v. Bowers (Tex. Civ. App.), 33 S. W. 131.

[42] Pratt v. McHatton, 11 La. Ann. 260; Robins v. Warde, 111 Mass. 244; Kohler v. Lindenmeyer, 129 N. Y. 498, 29 N. E. 957; Bank of British North America v. Delafield, 80 Hun (N. Y.) 564; Saunders v. Duval, 19 Tex. 467.

[43] Abbott v. Pearson, 130 Mass. 191; Rosenbaum v. Howard, 69 Minn. 41, 71 N. W. 823; Brackett v. Cunningham, 44 Minn. 498, 47 N. W. 157; Lindsay v. Guy, 57 Wis. 200, 15 N. W. 181. But see note in 52 L. R. A. 834 et seq., for instances in which books are and are not admissible for this purpose under particular and different circumstances.

[44] In the following cases partnership account books were admitted in favor of the partnership when properly authenticated, and in some instances one partner was permitted to prove delivery of goods and another to prove the entry of the charge. and in others the authentication was by proving the nature of the books by one partner and the handwriting of the other, who kept the books and was absent. Webb v. Michner, 32 Minn. 48, 19 N. W. 82; Ford v. Cunningham, 87 Cal. 209, 25 Pac. 403:

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been held that books of account are not rendered inadmissible by the fact that they are partnership books, or that they were kept by one partner and offered in a proceeding against the other after his death as a surviving partner.[45] In an interesting case in Indiana the plaintiff sought to replevy a boat from the defendant and the latter pleaded property in himself. The plaintiff claimed the property by purchase from a former partner of the defendant soon after the partnership had ended, and it appeared that the boat was built upon the partnership premises by the defendant and left there by him in care of an agent, when defendant removed from the premises at the expiration of the partnership. The defendant offered an entry in the partnership account book in evidence, charging himself in his own handwriting with the boat at a certain valuation, and the court held that it was admissible to show that the boat was his property.[46] So, on an issue as to whether a note executed by partners to a third person was signed by one of them as surety, the property for which it was given having been turned over to the firm, the partnership books were held admissible for him to show that the other partner was credited with the property.[47]

New Haven &c. Co. v. Goodwin, 42 Conn. 230; Butler v. Cornwall Iron Co., 22 Conn. 335; White v. Tucker, 9 Iowa 100; Mitchell v. Belknap, 23 Maine 475; Harwood v. Mulry, 8 Gray (Mass.) 250; Krom v. Levy, 47 How. Prac. (N. Y.) 97, 1 Hun (N. Y.) 171, 3 Thomp. & C. 704; Moore v. Knott, 14 Ore. 35, 12 Pac. 59; Alter v. Berghaus, 8 Watts (Pa.) 77; Thomson v. Porter, 4 Strob. Eq. (S. Car.) 58, 53 Am. Dec. 653; Wheeler v. Smith, 18 Wis. 651. But see Romer v. Jaecksch, 39 Md. 585; Burr v. Byers, 10 Ark. 398, 52 Am. Dec. 239; Walker v. Parkham, 3 McCord L. (S. Car.) 295.

[45] Ganahl v. Shore, 24 Ga. 17. In White v. Tucker, 9 Iowa 100, a partnership book was held admissible as to an individual account between one partner and a third person, it having been kept in such book by agreement.

[46] Reno v. Crane, 2 Blackf. (Ind.) 217. The book was authenticated by showing by one witness that it was the account book of the firm, and contained a correct charge against himself and by another, that he made up part of the book and that it was a copy from day books, blotters and documents, some of which were in the other partner's handwriting, and that it was a correct "exposition of the whole concern." But see Farner v. Turner, 1 Iowa 53.

[47] Strong v. Baker, 25 Minn. 442. See First Nat. Bank v. Conway, 67 Wis. 210, 30 N. W. 215.

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§ 913. **Compelling production of partnership books.**—The rule requiring the production of books and papers is especially applicable to such instruments and documents of a partnership. The partnership books are the property of the firm, and each member is equally entitled to their possession and to an examination and inspection thereof for any action he might wish to institute. In all such cases it is the uniform practice of courts at any stage of the action and upon the application of either party, to order the adverse party to produce or deposit any of the partnership books and papers belonging equally to both with some designated person or officer of the court, for the examination and inspection of the party making the application, and permitting copies to be taken by any of the partners. "In a court of law, it is a matter of course, to compel one party, who has the possession of a document which belongs equally to both, to produce same for the inspection of his adversary, for the purpose of the suit."[49] The general rule is that in action against an individual member of a partnership, the production of the firm books, papers and documents will not be ordered.[50] But it has been held that in certain cases under peculiar circumstances in an action against an individual member of a firm, the production of the partnership books would be required.[51]

§ 914. **Partnership books and papers as evidence—Between partners.**—In actions between partners the general rule is that the partnership books and accounts are admissible in evidence. The reason of this is that it is the duty of each partner to avail himself of the opportunity of inspection and to see that

[49] Rigdon v. Conley, 141 Ill. 565, 30 N. E. 1060; Kelly v. Eckford, 5 Paige Ch. (N. Y.) 548; Stebbins v. Harmon, 24 N. Y. Sup. Ct. 445; Bearns v. Barras, 86 Hun 258, 66 N. Y. St. 854, 33 N. Y. S. 262; Micklethwait v. Moore, 3 Meriv. 296; Pickering v. Rigby, 18 Ves. 484; Reid v. Coleman, 2 Cromp. & M. 456.

[50] Martine v. Albro, 26 Hun (N. Y.) 559, 2 Civ. Proc. R. 70, 63 How. Prac. 215; Reid v. Langlois, 1 Mac. N. & G. 627, 2 Hall & Tw. 59, 19 L. J. Ch. 337, 14 Jur. 467; Taylor v. Rundell, Craig & Ph. 104; Murray v. Walter, Craig & Ph. 114, 3 Jur. 719; Lopez v. Deacon, 6 Beav. 254.

[51] Martine v. Albro, 26 Hun (N. Y.) 559, 2 Civ. Proc. R. 70, 63 How. Pr. 215.

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the books are correctly kept. Hence as a corollary of this duty the entries in such books are prima facie correct and the presumption is that they were made with the consent of all the partners.[52] Entries in the partnership books are evidence for or against each of the partners.[53] And it has been held that entries on the firm books as to the sharing of profits and losses, when acquiesced in, are as conclusive on the rights of the partners as if incorporated in the articles of partnership.[54] Where the accounts of a new firm were kept in the same book as those of the old firm it was held that in the absence of proof of the knowledge of prior entries by the new member, the new member could only be charged with entries made after the new firm had begun business.[55]

[52] 2 Bates Partnership, §§ 978, 981; Chick v. Robinson, 95 Fed. 619, 37 C. C. A. 205, 52 L. R. A. 833 and note; Glover v. Hembree, 82 Ala. 324, 8 So. 251; Routen v. Bostwick, 59 Ala. 360; Powers v. Dickie, 49 Ala. 81; Desha v. Smith, 20 Ala. 747; Moore v. Trieber, 31 Ark. 113; Hale v. Brennan, 23 Cal. 511; Champlin v. Tilley, 3 Day (Conn.) 303; Cody v. First Natl. Bank. 103 Ga. 789, 30 S. E. 281; Stuart v. McKichan, 74 Ill. 122; Hunter v. Aldrich, 52 Iowa 442, 3 N. W. 574; Wilson v. Potter, 19 Ky. L. 988, 42 S. W. 836; Bannon v. Hawkins, 18 Ky. L. 150, 35 S. W. 636; Meguiar v. Helm, 91 Ky. 19, 14 S. W. 949, 12 Ky. L. 751; Simms v. Kirtley, 1 T. B. Mon. (Ky.) 79, 82; Strout v. Hopkins, 11 Ky. L. 63; Carpenter v. Camp, 39 La. Ann. 1024, 3 So. 269; Murrell v. Murrell, 33 La. Ann. 1233; Jordan v. White, 4 Mart. (N. S.) (La.) 335; Armistead v. Spring, 1 Rob. (La.) 567; Safe Deposit &c. Co. v. Turner, 98 Md. 22, 55 Atl. 1023; Topliff v. Jackson, 12 Gray (Mass.) 565; Lambert v. Griffith, 44 Mich. 65, 6 N. W. 106; Howard v. Patrick, 38 Mich. 795; Kohler v. Lindenmeyr, 129 N. Y. 498, 29 N. E. 957; Fairchild v. Fairchild, 64 N. Y. 471; Cheever v. Lamar, 19 Hun (N. Y.) 130; Taylor v. Herring, 10 Bosw. (N. Y.) 447; Caldwell v. Leiber, 7 Paige (N. Y.) 483; Heartt v. Corning, 3 Paige (N. Y.) 566; Phillips v. Turner, 22 N. Car. 123; Boire v. McGinn, 8 Ore. 466; Frick v. Barbour, 64 Pa. 120; Budeke v. Ratterman, 2 Tenn. Ch. 459; Hicks v. Chadwell, 1 Tenn. Ch. 251; Kyle v. Kyle, 1 Gratt. (Va.) 526; Brickhouse v. Hunter, 4 Hen. & Mun. (Va.) 363, 4 Am. Dec. 528; Fletcher v. Pollard, 2 Hen. & Mun. (Va.) 544; Willamette &c. Co. v. McGoldrick, 10 Wash. St. 229, 38 Pac. 1021; Lodge v. Pritchard, 3 DeG., M. & G. 906.

[53] Haller v. Willamowicz, 23 Ark. 566.

[54] Safe Deposit &c. Co. v. Turner, 98 Md. 22, 55 Atl. 1023.

[55] Kohler v. Lindenmeyr, 129 N. Y. 498, 29 N. E. 957, 58 Hun (N. Y.) 513.

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§ 915. Presumption of access to books—Denying correctness.—The presumption is that all the partners have access to the firm books and that they are familiar with the contents; but this presumption may be overcome by proof of any facts or circumstances which tend to rebut it.[56] But a partner may be estopped from denying to the prejudice of his copartner, any of the entries in the firm's books unless he charged and proved errors in such entries.[57] Yet where it appeared that the firm's business had been conducted almost exclusively and the books kept by one member, in an action between the partners, it was held competent for the other to introduce evidence showing the incorrectness of the entry, and also to show that other entries not made should have been made.[58] So the rule that the firm's books are evidence for or against a partner does not apply where one partner has been denied access to them.[59] And it may be shown that the books do not contain a full statement of the partnership business.[60]

§ 916. Partnership books and papers as evidence—Against partners.—As it is the duty of the partners to avail themselves of the opportunity of inspecting the books, and as they are presumed to know the contents and the entries in their books, it is the established rule that their books of accounts and papers are admissible against them in the nature of admissions against interest. And the rule is that the books of the firm are prima facie evidence against the partners as to all matters entered therein at the time of or prior to the transaction in question.[61] The entries are admissible against the partner making them, and

[56] United States Bank v. Binney, 5 Mason (U. S.) 176; Shoemaker &c. Co. v. Bernard, 2 Lea (Tenn.) 358.

[57] Murrell v. Murrell, 33 La. Ann. 1233. See Safe Deposit &c. Co. v. Turner, 98 Md. 22, 55 Atl. 1023.

[58] Carpenter v. Camp, 39 La. Ann. 1024, 3 So. 269.

[59] Haller v. Willamowicz, 23 Ark. 566.

[60] Glover v. Hembree, 82 Ala. 324, 8 So. 251.

[61] Kahn v. Boltz, 39 Ala. 66; Ford v. Cunningham, 87 Cal. 209, 25 Pac. 403; Agricultural Ins. Co. v. Keeler, 44 Conn. 161; Perry v. Butt, 14 Ga. 699; Kitner v. Whitlock, 88 Ill. 513; Eden v. Lingenfelter, 39 Ind. 19; Grant v. Masterton, 55 Mich. 161, 20

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if proved to have been made during the existence of the partnership they are admissible in evidence against all the partners.[62] And the firm books are admissible in evidence to show the credits on the plaintiff's account.[63] Where payments upon the private debts of one of the partners was entered in the firm book, the books were held to be admissible in evidence to prove knowledge of the other partner of such payments.[64]

§ 917. Partnership books and papers as evidence—Against third persons.—The admissibility of books of accounts of a firm in actions against third persons is governed principally by the rules controlling the admissibility of books and accounts generally. In some jurisdictions they are admitted on the theory that they are part of the res gestæ. The rule as established by many cases is that in an action by the partners on an account for goods sold by the firm to third persons the firm books are admissible as original entries where the books and entries are properly identified by a witness who assumes to know of his own knowledge, or who can testify to the handwriting as that of a member of the firm.[65] In some jurisdictions it is held that in order to make the entries admissible proof must be given that they were made contemporaneously with the facts narrated, and in the usual routine of business by a person whose duty it was to make them, who was himself personally acquainted with the facts, was disinterested and has since died.[66] But it has been held that the books of account of the firm are not admissible as against a person having no knowledge of such books.[67] Such an

N. W. 885; Tucker v. Peaslee, 36 N. H. 167; Kohler v. Lindenmeyr, 129 N. Y. 498, 29 N. E. 957; Walden v. Sherburne, 15 Johns. (N. Y.) 409; Shackelford v. Shackelford, 32 Grat. (Va.) 481.

[62] Kahn v. Boltz, 39 Ala. 66.

[63] Grant v. Masterton, 55 Mich. 161, 20 N. W. 885.

[64] Foster v. Fifield, 29 Maine 136.

[65] White v. Tucker, 9 Iowa 100; Silver v. Worcester, 72 Maine 322; Towle v. Blake, 38 Maine 95; Dwinel v. Pottle, 31 Maine 167; Mitchell v. Belknap, 23 Maine 475; Harwood v. Mulry, 8 Gray (Mass.) 250; Webb v. Michener, 32 Minn. 48, 19 N. W. 82; Strong v. Baker, 25 Minn. 442; Hartley v. Weideman, 175 Pa. St. 309, 34 Atl. 625; Graff v. Callahan, 158 Pa. St. 380, 27 Atl. 1009.

[66] Romer v. Jaecksch, 39 Md. 585.

[67] First Natl. Bank v. Conway, 67 Wis. 210, 30 N. W. 215.

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entry was held proper to show that an agreement of the firm had been performed.[68]

§ 918. Partnership books and papers as evidence—In favor of third persons.—In an action by a third person to hold another liable as a member of the firm as a general rule the books and papers of the alleged firm are not admissible. They are not usually competent for the purpose of proving that the defendant, sought to be charged as a partner, was in fact a partner. But when there is some proof offered showing or tending to show that such person was in fact a member of the firm or when a prima facie case of partnership is made then the books and papers of the firm are properly admitted.[69] This rule will be strengthened where it is made to appear that the person sought to be charged had access to the books during the period covered by the transaction, and that he did in fact examine the books and caused balance sheets to be taken and rendered to him.[70] Where the evidence shows or fairly tends to show that the person sought to be charged as a partner had knowledge of the entries and that he assented either expressly or impliedly to the entries in the books, it is a sufficient showing to render the entries in the books competent evidence.[71] So where it was shown that the entries were made in the books of the firm in the presence of the defendant sought to be charged as a partner, it was held sufficient to render such entries competent evidence.[72] Where one member of a partnership testifies that another person was a partner, and that the defendant sought to be charged had stated that he had

[68] Griesheimer v. Tanenbaum, 55 Hun 604, 8 N. Y. S. 582, 28 N. Y. St. 653; Moore v. Knott, 14 Ore. 35, 12 Pac. 59.

[69] McNeill v. Reynolds, 9 Ala. 313; Bryce v. Joynt, 63 Cal. 375, 49 Am. Rep. 94; Hale v. Brennan, 23 Cal. 511; New Haven &c. Co. v. Goodwin, 42 Conn. 230; Cleland v. Applegate, 8 Ind. App. 499, 35 N. E. 1108; Abbott v. Pearson, 130 Mass. 191; Robins v. Warde, 111 Mass. 244; Rosenbaum v. Howard, 69 Minn. 41, 71 N. W. 823; Ganzer v. Fricke, 57 Pa. St. 316; Chidsey v. Porter, 21 Pa. St. 390; Lindsay v. Guy, 57 Wis. 200, 15 N. W. 181.

[70] Bryce v. Joynt, 63 Cal. 375, 49 Am. Rep. 94.

[71] Rosenbaum v. Howard, 69 Minn. 41, 71 N. W. 823.

[72] Howard v. Patrick, 38 Mich. 795.

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as much interest in the books as the other partner, it was held a sufficient proof of partnership to admit the books in evidence.[73]

§ 919. **Authority of partner—Presumption.**—A partnership business is conducted on the theory of principal and agent; that the firm is the principal and each partner is the agent. The law therefore implies authority on the part of each partner to bind the firm, or his copartners by the use of the firm name in any and all transactions falling properly within the scope of the partnership. The rule as stated by one writer is: "In the absence of any express contract provision upon the subject, it will be presumed that it was intended that a partner should have authority to bind the firm by all acts necessary for carrying on the business in the way such a business is usually conducted, and a partner has actual and rightful authority to that extent."[74] Another writer states the rule as follows: "Prima facie, a partner has implied authority to bind the firm by any act necessary for carrying on the business in the ordinary manner. Unless limited by agreement between the partners, this implied authority is actual; when it is so limited, such authority is only apparent. A partner has power to bind the firm by any act within his express or implied authority, either actual or only apparent, provided the person with whom he deals acts bona fide, and without notice of the limitation of his authority."[75] Where the partnership

[73] Frick v. Barbour, 64 Pa. 120.

[74] Shumaker Partnership, p. 279.

[75] George Partnership, §§ 92, 93. See also Bank of Ft. Madison v. Alden, 129 U. S. 372, 32 L. ed. 725; Wheeler v. Sage, 1 Wall. (U. S.) 518, 17 L. ed. 646; Kimbro v. Bullitt, 22 How. (U. S.) 256, 16 L. ed. 313; Winship v. Bank of U. S., 5 Pet. (U. S.) 528, 529, 8 L. ed. 216; National &c. Bank v. White, 30 Fed. 412; Ellison v. Stuart, 2 Pennew. (Del.) 179, 43 Atl. 836; Summerlot v. Hamilton, 121 Ind. 87, 22 N. E. 973; First Nat. Bank v. Carpenter, 41 Iowa 518; Western Stage Co. v. Walker, 2 Iowa 504, 65 Am. Dec. 789; Eastman v. Cooper, 15 Pick. (Mass.) 276, 26 Am. Dec. 600; Banner &c. Co. v. Jenison, 48 Mich. 459, 12 N. W. 655; Taylor v. Webster, 39 N. J. L. 102; Livingston v. Roosevelt, 4 Johns. (N. Y.) 251, 4 Am. Dec. 273; Mercein v. Andrus, 10 Wend. (N. Y.) 461; Rice v. Jackson, 171 Pa. St. 89, 32 Atl. 1036; Hoskinson v. Eliot, 62 Pa. St. 393; Edwards v. Tracy, 62 Pa. St. 374; Pooley v. Whitmore, 10 Heisk. (Tenn.) 629, 27 Am. Rep. 733; Garland v. Hickey, 75 Wis. 178, 43 N. W. 832; Smith v. Sloan, 37 Wis. 285, 19 Am. Rep. 757; Beardsley v. Tut-

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agreement limits the authority of any partner he has no right to exceed the power therein given; but, if acting within the scope of the business he deals with a person who has no notice of the limitation, the firm is bound on the theory of the apparent authority.[76] Three classes of cases are sometimes enumerated in which each partner may bind the firm: (1) In case of express authority; (2) as to matters necessary in order to carry on the business of the partnership; (3) where it is the usage or custom incident to partnerships of like nature. But in each case the burden is usually on the plaintiff to prove facts sufficient to establish the authority or from which it may be implied.[77] Express authority must be shown in cases where it is desired to prove that acts done by one partner, such as the following, were binding on the firm: the execution of a contract of guaranty in the firm name;[78] the payment of individual debts with firm money;[79] the discharge of a firm debt by an individual note;[80] the modification of a contract for another partner's individual benefit.[81] But a partner's testimony is competent to show he had authority to use partnership funds to pay his individual debts.[82] Evidence affecting one or more partners is not inadmissible in an action against a firm and the individual partners, merely because it is not applicable to another partner.[83] Knowledge and assent of a partner to a contract made by a copartner without the scope

tle, 11 Wis. 74; Bates Partnership, ch. 6; Parsons Partnership, § 114 et seq.; Story Partnership, § 111 et seq.

[76] Irwin v. Williar, 110 U. S. 499. 28 L. ed. 225, 4 Sup. Ct. 160; Crane Co. v. Tierney, 175 Ill. 79, 51 N. E. 715; Morse v. Richmond, 97 Ill. 303; Wagnon v. Clay, 1 A. K. Marsh. (Ky.) 257; Conely v. Wood, 73 Mich. 203, 41 N. W. 259; Hotchin v. Kent, 8 Mich. 526; Schenk v. Fetzer, 54 Pa. Super. Ct. 573; Brooke v. Washington, 8 Grat. (Va.) 248.

[77] Vinegar Bend Lumber Co. v. Howard, 186 Ala. 451, 65 So. 172; Woodruff v. Scaife, 83 Ala. 152, 3 So. 311; Blake v. Atlantic Nat. Bank, 33 R. I. 464, 82 Atl. 225.

[78] Carson v. J. L. Mott Iron Works (Va.), 84 S. E. 12.

[79] Munday Trading Co. v. J. M. Radford Grocery Co. (Tex. Civ. App.), 178 S. W. 49.

[80] Fayette Liquor Co. v. Jones (W. Va.), 83 S. E. 726.

[81] Youtsey v. Lemley (Iowa), 151 N. W. 491.

[82] Munday Trading Co. v. J. M. Radford Grocery Co. (Tex. Civ. App.), 178 S. W. 49.

[83] Friese v. Simpson (Ga.), 84 S. E. 219.

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of the firm business must be affirmatively shown.[84] Evidence of common usage in the same locality and same business has been held competent to show the scope of a partnership business.[85] It will be presumed that a partner in a plumbing firm who individually signed a contractor's bond did so in his individual capacity,[86] and that an indorsement of a note in the firm name of a trading partnership was made in the course of business until the contrary is proved.[87] If a partnership or partner seeks to escape liability for an act of a partner within the scope of the business, they must bear the burden of showing his lack of authority and that the party with whom he dealt knew it.[88]

§ 920. **Liability of nominal partners—First rule.**—A nominal partner is defined as one who simply permits the use of his name in connection with the name of the firm for the purpose of giving the partnership additional credit or who by reason of his reputation and standing in the community adds strength and stability to the character of the firm and thereby attracts customers. A nominal partner really derives no benefit from the association but does incur the liabilities of the firm. The courts and law writers are not agreed on the liability of a nominal partner. The first rule, as established by some writers and many adjudicated cases, is that such nominal partner is liable to any and all persons or creditors dealing with the firm in the same manner and to the same extent as if he enjoyed all the advantages and privileges of the firm. The Supreme Court of New York has given the fullest expression to this rule, and held, in common with other courts, that a nominal partner is liable to subsequent creditors, even though the creditor was ignorant of the arrangement, or it appears that the firm name did not represent such a nominal partner or that credit was not given on the faith of his being a member of the firm.[89]

[84] Brown v. First Nat. Bank. 35 Okla. 726, 130 Pac. 140.

[85] Shackleford v. Williams, 182 Ala. 87, 62 So. 54.

[86] Schade v. Muller (Ore.), 146 Pac. 144.

[87] Garden City Nat. Bank v. Schulman, 89 Kans. 182, 131 Pac. 559.

[88] Lichenstein v. Murphree, 9 Ala. App. 108, 62 So. 444.

[89] Poillon v. Secor, 61 N. Y. 456; Chicago &c. Bank v. Kinnare, 174

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§ 921. **Liability of nominal partners—Second rule.**—Other courts and law writers adopt the rule that a nominal partner occupies the same relation to creditors as a person who with his consent is held out as a partner by the other members of the firm. One writer states this rule thus: "It follows, therefore, that if a person suffers himself to be regarded as a partner by any customer of the firm, to him he is liable as if he were one, although he is in fact no partner and not generally supposed to be."[90] The rule as stated by Mr. George is as follows: "In no case can liability attach to the nominal partner in favor of any one who has not given credit in full faith in his being a member of the firm, for it is there that the element of estoppel comes in, which is the vital element in the situation."[91] Under this rule proof is sufficient to render a nominal partner liable when it shows that such party represented himself to be a partner in the firm and his liability is fixed if the credit was given the firm under the expectation or belief that such nominal partner was a member at the time the credit was given.[92]

§ 922. **Liability of dormant partner.**—A dormant partner has been defined as one who combines in himself the characters of both the secret and silent partner while he is not published as a partner either through the firm name or otherwise, and does not transact any of the business, he is nevertheless a partner and maintains the relation of principal to the agent or the active partners who transact the firm business; in this respect he is distinguished from the person who shares profits of the business not as agent of the other partners but on their own account as principals.[93] A dormant partner is generally liable for the debts of

Ill. 358, 51 N. E. 607; Fisher v. Bowles, 20 Ill. 396; Nichols v. James, 130 Mass. 589; Rice v. Barrett, 116 Mass. 312; Rimel v. Hayes, 83 Mo. 200; Young v. Smith, 25 Mo. 341; Brown v. Higginbotham, 5 Leigh (Va.) 583, 127 Am. Dec. 618; 1 Bates Partnership, § 109.

[90] 1 Parsons Partnership, § 29.

[91] George Partnership, § 26. p. 84; Alderson v. Pope, 1 Campb. 404n.

[92] George Partnership, § 26; Hicks v. Cram, 17 Vt. 449; Waugh v. Carver, 2 H. Bl. 235, 1 Smith Lead. Cas. 1337; Watson, Ex parte, 19 Ves. 459.

[93] Winship v. Bank of U. S., 5 Pet. (U. S.) 528, 529, 8 L. ed. 216; Bank of St. Marys v. St. John, 25

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the firm to the same extent as an active or ostensible partner. To render him thus liable it is only necessary that the proof disclose the fact that he is a partner and he is liable as such to persons dealing with the firm though they have no knowledge of the fact that he was a member. The reason of this liability is the fact that such dormant partner shares in the benefits of the business whatever that may be.[94] Judge Clifford states the rule as to the liability of a dormant partner as follows: "Persons who jointly participate in the profits of trade or business, ostensibly carried on by another for his sole use and benefit within the principles already explained, are equally liable, when discovered, with the ostensible and active owner, to all creditors of the concern whose debts were contracted during the time of such participation, without knowledge of the same, or of the actual relation between the parties at the time the credit was given, and that liability exists, notwithstanding the parties may have privately stipulated that they shall not be partners, and in contemplation of law really are not such as between themselves. Secrecy on the part of the dor-

Ala. 566; Podrasnik v. Martin Co., 25 Ill. App. 300; Elmira &c. R. Co. v. Harris, 124 N. Y. 280, 26 N. E. 541, 3 Silv. Ct. App. 351; National Bank &c. v. Thomas, 47 N. Y. 15; North v. Bloss, 30 N. Y. 374; Clark v. Fletcher, 96 Pa. St. 416; Harris v. Crary, 67 Tex. 383, 3 S. W. 316; George Partnership, p. 95; Parsons Partnership, § 31.

[94] Meehan v. Valentine, 145 U. S. 611, 36 L. ed. 835, 12 Sup. Ct. 972; Winship v. United States Bank, 5 Pet. (U. S.) 529, 8 L. ed. 216; Phillips v. Nash, 47 Ga. 218; Lindsey v. Edmiston, 25 Ill. 317; Strecker v. Conn, 90 Ind. 469; Gilmore v. Merritt, 62 Ind. 525; Kennedy v. Bohannon, 11 B. Mon. (Ky.) 118; Scott v. Colmesnil, 7 J. J. Marsh. (Ky.) 416; Boudreaux v. Martinez, 25 La. Ann. 167; Etheredge v. Binney, 9 Pick. (Mass.) 272; Pitts v. Waugh, 4 Mass. 424; Lea v. Guice, 13 Sm. & M. (Miss.) 656; Richardson v. Farmer, 36 Mo. 35, 88 Am. Dec. 129; Eastman v. Clark, 53 N. H. 276, 16 Am. Rep. 192; Elliot v. Stevens, 38 N. H. 311; Bromley v. Elliot, 38 N. H. 287, 75 Am. Dec. 182; North v. Bloss, 30 N. Y. 374; Fosdick v. Van Horn, 40 Ohio 459; Johnston v. Warden, 3 Watts. (Pa.) 101; Reab v. Pool, 30 S. Car. 140, 8 S. E. 703; Gavin v. Walker, 14 Lea (Tenn.) 643; Griffith v. Buffum, 22 Vt. 181, 54 Am. Dec. 64; Boardman v. Keeler, 2 Vt. 65; Coope v. Eyre, 1 H. Bl. 37; Loyd v. Ashby, 2 Car. & P. 138; Robinson v. Wilkinson, 3 Price 538, 18 Rev. Rep. 659; Lloyd v. Archbowle, 2 Taunt. 324; Parsons Partnership, § 81.

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mant partner and want of knowledge of the circumstances of the case, and of the actual relations of the parties, on the part of the creditor, are therefore essential elements of the liability."[95]

§ 923. Liability of dormant partner—Limitation.—This liability of a dormant partner does not continue after his retirement from the firm; and it is not necessary for him to give notice of such retirement in order to relieve him of such liability. The reason of this is that credit is not given the firm on account of his name and the liability is on the basis that he is either an undisclosed principal or that he received part of the profits, and when he ceases to be a principal or to receive the profits his liability ceases.[96] So, in an action on a note or contract executed in the partnership name, in order to establish the liability of a dormant partner, the plaintiff must prove that the money was borrowed or the contract executed on the credit of the firm, or that the money was used in the business or for the benefit of the partnership; but the fact that it was borrowed on the credit of the firm or used in its business may be proved by the statements and representations of the partner executing the note or contract at the time of the transaction, or it may be proved by circumstances.[97] But the dormant partner is only liable for the debts of the firm contracted within the scope of the partnership business.[98]

[95] Bigelow v. Elliot, 1 Cliff. (U. S.) 28, Fed. Cas. No. 1399. See also, First Nat. Bank v. Newton, 10 Colo. 161, 14 Pac. 428; Fosdick v. Van Horn, 40 Ohio St. 459.

[96] Austin v. Appling, 88 Ga. 54, 13 S. E. 955; Phillips v. Nash, 47 Ga. 218; Kennedy v. Bohannon, 11 B. Mon. (Ky.) 118; Lieb v. Craddock, 87 Ky. 525, 9 S. W. 838, 10 Ky. L. 570; Grosvenor v. Lloyd, 1 Metc. (Mass.) 19; Elmira &c. Co. v. Harris, 124 N. Y. 280, 26 N. E. 541, 3 Silv. Ct. App. 351; Cook v. Penrhyn Slate Co., 36 Ohio St. 135, 38 Am. Rep. 568; Clark v. Fletcher, 96 Pa. St. 416; Gavin v. Walker, 14 Lea (Tenn.) 643; Commercial Bank v. Miller, 96 Va. 357, 31 S. E. 812; Griffith v. Buffum, 22 Vt. 181, 54 Am. Dec. 64; Benjamin v. Covert, 47 Wis. 375, 2 N. W. 625.

[97] United States Bank v. Binney, 5 Mason (U. S.) 176; Etheredge v. Binney, 9 Pick (Mass.) 272; Manufacturers' &c. Bank v. Winship, 5 Pick. (Mass.) 11, 16 Am. Dec. 369; National Bank &c. v. Ingraham, 58 Barb. (N. Y.) 290; Oliphant v. Mathews, 16 Barb. (N. Y.) 608; Fosdick v. Van Horn, 40 Ohio St. 459; Yorkshire Banking Co. v. Beatson, L. R. 5 C. P. 109.

[98] Munn, Ex parte, 3 Biss. (U. S.)

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So where the ostensible partner had executed notes in the firm name as the evidence of a debt, and the note was afterward reduced to judgment, it was held that a dormant partner when discovered was not liable on the note.[99] Though it is prima facie evidence of ownership that a partner in charge of a manufacturing plant deals with it as his own, this presumption is rebuttable by proof.[1]

§ 924. Authority of partner—Particular cases.—Evidence may be given to show that acts of an individual partner without the scope of his authority were ratified by his copartners.[2] Evidence of statements made to the other partners by the one who is sought to be charged with ratification are admissible.[3] Partnership liability may be defeated by showing that a note was executed in consummating an individual deal of one partner with plaintiff;[4] by showing that the partners had agreed not to buy stock, where one partner had contracted in the firm name to buy stock in a butter factory;[5] or that a loan was originally an individual transaction.[6] It may be shown that the firm was liable on contracts in the individual name of a partner, as for renting horses.[7] In many cases a partnership has been held liable on a contract made by one partner through evidence of participation in benefits or that the consideration inured to its use.[8] The plaintiff alleging fraud in a conveyance by his debtor to a copartner in settlement of a partnership, must prove it;[9] also one who charges a partner with an absconded copartner's fraud, must prove his connection with the fraud if without the scope of the

442, Fed. Cas. No. 9925; Bromley v. Elliot, 38 N. H. 287, 75 Am. Dec. 182; Bank of Pennsylvania &c. v. Hadfeg, 3 Yeates (Pa.) 560.

[99] Moale v. Hollins, 11 Gill & J. (Md.) 11, 33 Am. Dec. 684.

[1] Day v. Weyant, 72 Ore. 215, 143 Pac. 891.

[2] Wile v. Denison Clothing Co., 158 Iowa 109, 138 N. W. 1098.

[3] Fischer v. Eyre, 151 N. Y. S. 692.

[4] Schee v. Hendrickson, 162 Iowa 219, 144 N. W. 29.

[5] Chicago Bldg. &c. Co. v. Butler, 139 Ga. 816, 78 S. E. 244.

[6] Smith v. Sheridan, 175 Mich. 391, 141 N. W. 684.

[7] Crable v. O'Connor, 21 Wyo. 460, 133 Pac. 376.

[8] Jacks v. Greenhaw, 105 Ark. 615, 152 S. W. 160.

[9] Ball v. Danton, 64 Ore. 184, 129 Pac. 1032.

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copartner's authority;[10] and where it is pleaded that the partnership had assumed the debts of one partner it must be proved.[10a] But the burden is on the defendant who asserts a release as a partner from a firm contract on withdrawal from the partnership;[11] or asserts that a bank did not act in good faith in making a loan to a member of a trading partnership;[12] or that a corporation has taken over the firm debts.[13] In an action against the firm on notes executed by one partner, testimony of the copartner that he directed the partner not to borrow any more money of the plaintiff is inadmissible without showing notice to plaintiff of such dissent.[14] A note signed in the firm name and by a partner individually is admissible against another partner, if there is nothing to show he is not a member of the firm.[15] A plaintiff who sued alone to recover for boating cattle, by means of using a steamboat which was the property of a firm in which he was a partner, must fail where the evidence shows the other partner was interested in the contract.[16] In an action by a firm for trespass on leased land, the lease was admissible, and evidence that the firm was in possession and the lease was executed for its benefit, though others than those named therein were interested in the firm, also evidence of one partner that he leased the land and paid the rent for the firm.[17] In an action in the firm name by one member of a firm to recover a sum claimed as a balance due from defendant for excavating under a written contract, in which plaintiff claimed that defendant conspired with two other members of the firm to settle in full for a less amount than was due, the evidence of defendant's general manager that one of the other partners had never claimed

[10] Monmouth College v. Dockery, 241 Mo. 522, 145 S. W. 785.

[10a] Stover v. Stevens, 21 Cal. App. 261, 131 Pac. 332.

[11] Western Lumber & Pole Co. v. Joslyn, 66 Wash. 524, 120 Pac. 69.

[12] First Nat. Bank of St. Paul v. Webster, 130 Minn. 277, 153 N. W. 736.

[13] Leckie v. Bennett, 160 Mo. App. 145, 141 S. W. 706.

[14] Phipps v. Little, 213 Mass. 414, 100 N. E. 615.

[15] Tennessee Valley Bank v. Avery, 9 Ala. App. 363, 63 So. 813.

[16] Bryant v. Phillips, 189 Mo. App. 278, 176 S. W. 294.

[17] Noble v. Hudson, 20 Wyo. 227, 122 Pac. 901.

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more money was due than was paid him under the contract with the firm, was admissible on the question of good faith in making the settlement, and to show that the other partners construed the contract as did the defendant. His evidence was also admissible to show that a payment made to another company for dirt used in a fill was charged to plaintiff's firm. The receipt given in full by the other partner was also evidence to show a partial payment under the contract.[18] Where the plaintiff's bookkeeper, the owner of the business, and two others signed a bill of sale to a new corporation of a business formerly carried on under a partnership name, this was not conclusive evidence that the bookkeeper was a partner who had authority to waive the rights of the person who had previously conducted the business.[19]

§ 925. **Authority of partner after dissolution.**—The presumption that each member of a firm has the authority to bind his partners ceases on the dissolution of the firm. There is no longer either the community of interest or relation of principal and agent that authorizes one partner to act for the other. And if one member of the firm continues in the business he has no power to execute contracts in the firm name after the dissolution where the person with whom he dealt had notice of such dissolution.[20] Nor has one partner the power to renew a note in the firm name after dissolution.[21] But after dissolution in the absence of any agreement to the contrary each partner has been held authorized to collect and receipt for debts due the firm,[22] and it has been held that all the partners are liable for money collected by one of them after the dissolution of the firm where the firm had engaged to collect the money.[23] Where there is no agreement as to the method of winding up partnership business after dissolution each partner has the same authority to adjust

[18] Storrie v. Ft. Worth Stockyards Co. (Tex.), 143 S. W. 286.

[19] Gerli v. Mistletoe Silk Mills (N. J.), 93 Atl. 571.

[20] Hayden v. Cretcher, 75 Ind. 108; Floyd v. Miller, 61 Ind. 224.

[21] Lange v. Kennedy, 20 Wis. 279.

[22] Major v. Hawkes, 121 Ill. 298; Heartt v. Walsh, 75 Ill. 200.

[23] Smyth v. Harvie, 31 Ill. 62, 83 Am. Dec. 202.

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its affairs by collecting its debts and disposing of its property as before the dissolution; in other words, the partnership continues for the purposes of settlement and liquidation.[24] But where the partners on dissolution appoint an agent to settle their affairs it has been held that a person with notice of such fact deals with one of the former partners at his peril.[25]

§ 926. Dissolution—Notice of dissolution.—It is sometimes necessary to prove whether or not a partnership has been dissolved.[26] Evidence that one defendant in an action for a partnership accounting had told the plaintiff by telephone that a former partner had withdrawn, was not sufficient to establish such withdrawal.[27] Evidence that there were no outstanding debts and there had been no final settlement was held to sustain a finding that a partnership between plaintiffs had not been dissolved before commencing a suit in the firm name.[28] Where the proof showed that after the date when it was alleged a partnership was dissolved, a retiring partner remained, doing the same work, signing the firm name to checks, and orders for goods, and shared in the profits, this was sufficient to show him a member of the firm, and a verdict finding the other member the sole owner of the stock and fixtures was unsupported by the evidence.[29] The mere dissolution of a firm will not of itself absolve the individual partners from future liability, especially where the business

[24] Barnes v. Northern Trust Co., 169 Ill. 112, 48 N. E. 31; Needham v. Wright, 140 Ind. 190, 39 N. E. 510; Hogendobler v. Lyon, 12 Kans. 276; Milliken v. Loring, 37 Maine 408; Gordon v. Albert, 168 Mass. 150, 46 N. E. 423; Bass v. Taylor, 34 Miss. 342; Gray v. Green, 142 N. Y. 316, 37 N. E. 124; Robbins v. Fuller, 24 N. Y. 570; Murray v. Mumford, 6 Cow. (N. Y.) 441; Miller v. Florer, 15 Ohio St. 148; Riddle v. Etting, 32 Pa. St. 412; 2 Bates Partnership, § 679 et seq.; Parsons Partnership, § 287 et seq.

[25] Hilton v. Vanderbilt, 82 N. Y. 591.

[26] Grant v. Bannister, 160 Cal. 774, 118 Pac. 253; Breyfogle v. Bowman, 157 Ky. 62, 162 S. W. 787; Spurlock v. Wilson, 160 Mo. App. 14, 142 S. W. 363; Hutchinson v. Sperry, 158 App. Div. 704, 143 N. Y. S. 876; In re Burdick, 79 Misc. 167, 140 N. Y. S. 582, 4 N. Y. Civ. Proc. R. 21.

[27] Heck v. Collins, 231 Pa. 357, 80 Atl. 535.

[28] Georgia Northern Ry. Co. v. Snellgrove (Ga. App.), 85 S. E. 790.

[29] Higgenbotham v. Stanley, 36 Okla. 302, 128 Pac. 238.

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is continued in the same name. In order to avoid liability the persons retiring from the firm must give notice of the dissolution and that they are no longer members of the firm. Where the business is continued the former members are liable to persons who have previously dealt with the firm and who have received no notice of the dissolution.[30] A notice generally is not of itself sufficient to relieve from liability in such cases; the proof must show that the notice was brought home to all persons who had formerly dealt with the firm. This rule was not carried to the extent of holding that the old firm was liable to a creditor that had not previously dealt with the firm; but generally speaking there must be actual notice to those who have dealt with the firm in order to protect a partner after dissolution.[31] In such cases it is sufficient to prove that the creditor had knowledge of the dissolution of the firm or withdrawal of the partner.[32] But receipt of a notice must be proved and it has been held insufficient to prove that a written notice was mailed to the creditor.[33] Notice given to the agent with whom the contract was made was held sufficient.[34] And a general notice by publication to the world of the dissolution or retirement of the partner has been held sufficient to all persons except former customers.[35]

[30] Duff v. Baker, 78 Iowa 642, 43 N. W. 463; Stimson v. Whitney, 130 Mass. 591; Hixon v. Pixley, 15 Nev. 475; Palmer v. Dodge, 4 Ohio 21, 62 Am. Dec. 271; Thompson v. Harmon (Tex. Civ. App.), 152 S. W. 1161; Clement v. Clement, 69 Wis. 599, 35 N. W. 17, 2 Am. St. 760.

[31] Joseph v. Southwark &c. Co., 99 Ala. 47, 10 So. 327; Nicholson v. Moog, 65 Ala. 471; Richards v. Hunt, 65 Ga. 342; Meyer v. Krohn, 114 Ill. 574, 2 N. E. 495; Iddings v. Pierson, 100 Ind. 418; Strecker v. Conn, 90 Ind. 469; Rose v. Coffield, 53 Md. 18, 36 Am. Rep. 389; Sibley v. Parsons, 93 Mich. 538, 53 N. W. 786; Martin v. Fewell, 79 Mo. 401; Stoddard Mfg. Co. v. Krause, 27 Nebr. 82, 42 N. W. 913; National Shoe &c. Co. v. Herz, 89 N. Y. 629; Speer v. Bishop, 24 Ohio 598; Long v. Garnett, 59 Tex. 229; Thompson v. Harmon (Tex. Civ. App.), 152 S. W. 1161; Gilchrist v. Brande, 58 Wis. 184, 15 N. W. 817.

[32] Backus v. Taylor, 84 Ind. 503; Uhl v. Bingaman, 78 Ind. 365; Kehoe v. Carville, 84 Iowa 415, 51 N. W. 166; Martin v. Walton, 1 McCord (S. Car.) 16; Prentiss v. Sinclair, 5 Vt. 149, 26 Am. Dec. 288.

[33] Meyer v. Krohn, 114 Ill. 574, 2 N. E. 495.

[34] Hunt v. Colorado &c. Co., 1 Colo. App. 120, 27 Pac. 873.

[35] Joseph v. Southwark &c. Co., 99 Ala. 47, 10 So. 327; Rocky Moun-

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§ 927. Admissions after dissolution.—As the community of interest as well as the agency of the partner terminates on the dissolution and the authority of each to bind the firm ceases, it follows as a rule that one of the partners after dissolution can not bind the others by an admission of liability.[86] Where partners terminated their relations, and executed mutual releases, and then the plaintiff transferred to his former partner all interest in certain property, it was held that subsequent admissions that plaintiff was still interested therein were insufficient to establish such interest as against the former partner's widow. But a contract between the plaintiff and a continuing partner two years after dissolution of a firm, is admissible to show whether a defendant was released from obligation on a contract between plaintiff and the firm.[87] And it is generally held that a partner after dissolution can not take a case out of the operation of the statute of limitations by an admission of liability, new promise, or partial payment.[88] The rule on this subject is stated as follows: "After dissolution, a partner's authority to bind his copartner is limited to acts necessary or proper for the winding up of the partnership affairs."[89]

tain &c. Bank v. McCaskill, 16 Colo. 408, 26 Pac. 821; Richardson v. Snider, 72 Ind. 425, 37 Am. Rep. 168; Rose v. Coffield, 53 Md. 18, 36 Am. Rep. 389; Polk v. Oliver, 56 Miss. 566; Stoddard Mfg. Co. v. Krause, 27 Nebr. 83, 42 N. W. 913.

[86] Barnes v. Northern Trust Co., 169 Ill. 112, 48 N. E. 31; Walden v. Sherburne, 15 Johns. (N. Y.) 409; Smith v. Ludlow, 6 Johns. (N. Y.) 267; Hackley v. Patrick, 3 Johns. (N. Y.) 536; Hopkins v. Banks, 7 Cow. (N. Y.) 650; Hart v. Woodruff, 24 Hun (N. Y.) 510; Brisban v. Boyd, 4 Paige Ch. (N. Y.) 17; Feigley v. Whitaker, 22 Ohio St. 606, 10 Am. Rep. 778; Myers v. Standart, 11 Ohio St. 29; Lehman v. Heuston, 73 Wash. 154, 131 Pac. 825.

[87] Holbert v. Keller, 161 Iowa 723, 142 N. W. 962.

[88] Bell v. Morrison, 1 Pet. (U. S.) 351, 7 L. ed. 174; Tate v. Clements, 16 Fla. 339, 26 Am. Rep. 709; Van Keuren v. Parmelee, 2 N. Y. 523, 51 Am. Dec. 322; Forbes v. Garfield, 32 Hun (N. Y.) 389; Jack v. McLanahan, 191 Pa. St. 631, 43 Atl. 356; Bush v. Stowell, 71 Pa. St. 208, 10 Am. Rep. 694; Reppert v. Colvin, 48 Pa. St. 248; Levy v. Cadet, 17 Serg. & R. (Pa.) 126, 17 Am. Dec. 650; Davis v. Poland, 92 Va. 225, 23 S. E. 292; Clement v. Clement, 69 Wis. 599, 35 N. W. 17, 2 Am. St. 760. See ante §§ 468, 600.

[89] Shumaker Partnership, § 148.

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§ 928. Admissions by surviving partner.—As already stated, the dissolution of a partnership operates as a revocation of all authority for making new contracts or creating new partnership obligations. This rule applies where the partnership is dissolved by death as well as where there is a voluntary dissolution.[40] A surviving partner, however, because of his personal obligation to pay the debt, and his right to obtain his own equity in the residue, usually succeeds to the entire legal title to the partnership property and has the right to wind up its affairs.[41] This does not ordinarily give him the right to create new obligations or make admissions that would do so as against the old partnership, or the heirs of the deceased partners, but, at least in jurisdictions where judgments against the survivor are treated as res inter alios acts, and not merely as prima facie evidence against the representatives of the deceased partner, the admissions of the survivor subsequent to the dissolution, within his authority as a liquidating partner, would clearly seem to be competent in a suit in which he is defendant.[42]

§ 929. Accounting—Burden of proof.—In an action for an accounting where a partner claims a balance due him from the firm, and where no entries have been made of the account at the time of the alleged settlement, the burden is upon the plaintiff to prove the indebtedness.[43] This rule also applies to proof of a contract to pay for a partner's services;[44] to show the amount of his personal expenses;[45] or to show an agreement to compound interest on sums advanced by the other partner. In such

[40] See ante §§ 593, 597.

[41] Russell v. McCall, 141 N. Y. 437, 36 N. E. 498, 38 Am. St. 807; Bates Partnership, §§ 718, 722. As to entries in the books by a surviving or liquidating partner, see note in 52 L. R. A. 846.

[42] Gillett Indirect and Collateral Ev., § 42. See also Kirk v. Hiatt, 2 Ind. 322; Gilmore v. Ham, 142 N. Y. 1, 36 N. E. 826, 40 Am. St. 554 and note; notes in 77 Am. Dec. 114; 86 Am. Dec. 600; 65 Am. Dec. 295; 51 Am. Dec. 330.

[43] McCabe v. Franks, 44 Iowa 208; McMichael v. Raoul, 14 La. Ann. 307; Camblat v. Tupery, 2 La. Ann. 10; Maupin v. Daniel, 3 Tenn. Ch. 223.

[44] Mondamin Bank v. Burke, 165 Iowa 711, 147 N. W. 148.

[45] Boeing v. Fordney (Mich.), 150 N. W. 852; Sandberg v. Scougale, 75 Wash. 313, 134 Pac. 1051.

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an action it is held that the plaintiff must produce the evidence necessary to fix the rights of the partners, or there can be no recovery,[46] and generally, the partner seeking a credit must prove his right to it.[47] Letters written by one partner to another, showing what property he owned in another state, were held irrelevant on a partnership accounting and calculated to prejudice the jury.[48] In an action for loss of profits on sale of cattle purchased in partnership, evidence as to the cost of handling the cattle on delivery and as to the loss on cut-backs, was competent.[49] Where a partner claimed land as his individual property, which he had paid for out of a bank deposit, it was error to exclude a bank account offered to show he had no such deposit.[50] So where the partnership affairs have been adjusted and the settlement of the account signed by the partners, the burden is on the partner complaining to show an error in the settlement or that the firm is indebted to him;[51] or to show fraud,[52] or misconduct of a partner.[53] This rule as to the burden has been carried to the extent of holding that the evidence must be most satisfactory for the ascertainment of the true balance between the partners.[54] And in an action for a settlement and an accounting the burden has been held to be on the plaintiff to prove a dissolution of the firm.[55] In an action for an accounting where a partner fails to produce the books of accounts in his possession, an account may

[46] Camblat v. Tupery, 2 La. Ann. 10; McIntyre v. Johnston, 63 Wash. 323, 115 Pac. 509.

[47] Grant v. Bannister, 160 Cal. 774, 118 Pac. 253; Bruner v. Jacobson, 115 Minn. 425, 132 N. W. 995; Wise v. Wise, 244 Pa. 611, 90 Atl. 925; Shrader v. Downing, 79 Wash. 476, 140 Pac. 558.

[48] Hengy v. Hengy (Tex. Civ. App.), 151 S. W. 1127.

[49] Fuller v. El Paso Live Stock Commission Co. (Tex. Civ. App.), 174 S. W. 930.

[50] Hengy v. Hengy (Tex. Civ. App.), 151 S. W. 1127.

[51] Bry v. Cook, 15 La. Ann. 493.

[52] Summerill v. Summerill (N. J. Ch.), 93 Atl. 726.

[53] Phillips v. Crownfield, 124 Md. App. 443, 92 Atl. 1030.

[54] Davidson v. Wilson, 3 Del. Ch. 307.

[55] Gossett v. Weatherly, 5 Jones Eq. (N. Car.) 46.

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be stated by presuming everything against him,[56] but the absence of the firm books may prevent the stating of an account where the bill and answer are conflicting.[57]

[56] Walmsley v. Walmsley, 3 Jones & Lat. 556.

[57] Davidson v. Wilson, 3 Del. Ch. 307.

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CHAPTER XXVIII

TAXATION OF PARTNERSHIP PROPERTY

SECTION

935. Taxation of partnership property, in firm name.
936. Taxation of good will of partnership.
937. Place of taxation of partner's interest.
938. Place of taxation of partnership property—Generally.
939. Place of taxation under statutes of different states.
940. Massachusetts cases.
941. Michigan cases.
942. Taxation after dissolution.
943. Taxation of property of joint stock company.
944. Notice to redeem from tax sale.

§ 935. Taxation of partnership property in firm name.—Under the tax laws of many of the states a partnership is practically considered an entity for purposes of taxation and instead of taxing partnership property to the partners as individuals, the property of a partnership is listed and assessed to the firm in the firm name, as corporate property is assessed to a corporation in its corporate name, usually at the place of location of the property or the business.[1] The rule that partnership property is to be assessed to the firm has been applied in the absence of statute.[2]

[1] Commonwealth v. Schmelz, 114 Va. 364, 76 S. E. 905. See also Alabama 1 Code, § 2108; Arizona Rev. Stat., § 4860; Arkansas Kirby Dig. 1904, § 6903; California Pol. Code, § 3629, (2) (6); Colo. 2 Mills Ann. Code, § 6231; Idaho 1 Rev. Codes, § 1673; Ill. 5 Ann. Stat., § 9219; 4 Burns Ind. Ann. Stat. 1914, § 10162; Iowa Code 1897, §§ 1313, 1317; Massachusetts Acts 1909, ch. 490, §§ 27, 41, 43; Michigan 1 Howells Stats., § 1780; Minnesota Gen. Stat. 1913, § 1994; Montana 1 Rev. Codes, § 2521; Nevada 1 Rev. Laws, §§ 3626, 3629; Nebraska Rev. Stat., §§ 6298, 6313; Oklahoma 2 Rev. Laws, § 7311; Ohio 3 P. & A. Gen. Code, §§ 5320, 5370; Pennsylvania 5 Purdon's Dig., § 6060; Texas 3 Civ. Stat., § 7509; West Virginia Code 1906, § 744; Virginia Code 1904, §§ 492, 494, Tax Bill, § 143. See ante § 306.

[2] Stockwell v. Brewer, 59 Maine 286; Hopkins v. Baker Bros., 78 Md. 363, 28 Atl. 284, 22 L. R. A. 477; Sage v. Burlingame, 74 Mich. 120, 41 N. W. 878; Hubbard v. Winsor, 15 Mich. 146.

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While these statutes permit the taxing of partnership property in the firm name, this fact would not, it seems, and it is so provided in some of the statutes, change the liability of each partner for the entire amount of the tax.[3] A slight discrepancy from the correct firm name in the name in which partnership property is assessed to the firm, will not invalidate the tax if no one is misled;[4] as where the firm name was reversed;[5] or the assessment was in one of several names in which the firm did business.[6] However, in Louisiana it was held that a purchaser of property belonging to Keller & Co. which was sold for taxes of J. N. Keller as his property, got no title.[7] Under some statutes it is not invalid to assess partnership property in the name of one of the members of the firm.[8] The fact that lands owned by partners as joint tenants are assessed to the partnership, is not an error of which they can complain.[9]

§ 936. Taxation of good-will of partnership.—The question as to the right to tax the good will of a partnership and as to its assessment in condemnation proceedings was discussed in the chapter on good will.[10]

§ 937. Place of taxation of partner's interest.—The general holding seems to be that the situs for taxation of a deceased partner's interest is the place where the business was carried on when he died, the leading case holding that where two brothers residing in England were carrying on business in partnership as graziers and sheep farmers through their agent in New South Wales, the interest of one of them in the partnership property at the time of his death was liable to pay stamp and probate duties imposed by New South Wales.[11] This rule is generally fol-

[3] Burns' Ind. Rev. Stat. 1914, § 10162.

[4] (So provided by statute), Hill v. Graham, 72 Mich. 659, 40 N. W. 779.

[5] Van Dyke v. Carleton, 61 N. H. 574.

[6] Lyle v. Jacques, 101 Ill. 644.

[7] Thibodaux v. Keller, 29 La. Ann. 508.

[8] Fletcher v. Post, 104 Mich. 424, 62 N. W. 574; Welles v. Battelle, 11 Mass. 477.

[9] Hubbard v. Winsor, 15 Mich. 146.

[10] See ante § 324.

[11] Commissioner of Stamp Duties

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lowed in levying probate, succession, or inheritance taxes.[12] So it has been held in a good many instances that the situs for purposes of taxation, of a nonresident partner's interest in partnership property, is the place where the property is located.[13] It has been held that the interest in a California farm of a partner living in New York, is not assessable against his executors in New York at his death, since there is nothing owing the executors until the firm debts are liquidated.[14] Where a partner is assessed individually for his interest in firm property, he is not entitled to deduct firm debts due in the state, but may have his proportionate share in such debts deducted, upon making a proper showing.[15] But if some of the members are nonresidents, it is held the firm is not entitled to deductions for debts.[16]

§ 938. Place of taxation of partnership property—Generally.—If the situs of partnership personal property for the purpose of taxation is not fixed by statute the general rule is that it should be taxed at the place where the business is carried on, even though the partners may reside elsewhere.[17] As said in

v. Salting [1907], Ann. Cas. 449. See also Re Ewing, 6 Prob. Div. 19; Laidlay v. Lord Advocate (1890), 15 App. Cas. 468. See ante § 306.

[12] Beaver v. Master of Equity [1895], Ann. Cas. 251; Bridgeport Trust Co.'s Appeal, 77 Conn. 657, 60 Atl. 662; Gallup's Appeal, 76 Conn. 617, 57 Atl. 699; Small's Appeal 151 Pa. 1, 25 Atl. 23, 28. See also Re King, 30 Misc. 575, 63 N. Y. S. 1100. Compare Forbes v. Steven, L. R. 10 Eq. 178 and Stokes v. Ducroz, 62 L. T. (N. S.) 176.

[13] Duer v. Small, Fed. Cas. No. 4116, 4 Blatchf. 263, 17 How. Prac. 201; Oliver v. Lynn, 130 Mass. 143; Hoadley v. Essex, 105 Mass. 519; Bemis v. Boston, 14 Allen (Mass.) 366; Taylor v. Love, 43 N. J. L. 142; People v. Wells, 85 App. Div. 440, 83 N. Y. S. 387.

[14] People v. Coleman, 44 Hun (N. Y.) 20.

[15] State v. Parker, 34 N. J. L. 71. See also Taylor v. Love, 43 N. J. L. 142.

[16] State v. McChesney, 35 N. J. L. 548.

[17] Louisville v. Tatum, 111 Ky. 747, 64 S. W. 836; School District v. Bowman, 178 Mo. 654, 77 S. W. 880; State ex rel. School District v. Bowman, 178 Mo. 663, 77 S. W. 1135; State Tatem Prosecutor v. McChesney, 35 N. J. L. 548. Compare Taylor v. Love, 43 N. J. L. 142. See also St. John v. Mobile, 21 Ala. 224; In re Hatt, 7 L. J. 103, Digest Ontario Case Law, vol. 3, p. 5197. See ante § 306.

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[4] (So provided by statute), Hill
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[5] Van Dyke v. Carleton, 61 N
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[6] Lyle v. Jacques, 101 Ill. 64

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xation under statutes of different states. rship property for the purposes of taxation statute in most jurisdictions. These stat- states and no general rules as to them can nnecticut statute[21] provides "the property of ntile, manufacturing, or mechanical business he name of the owner or owners in the town, here the business is carried on." It further person having charge of the business, if not ve in the names of the owners and the valu- the average amount of goods kept on hand So the property of a partnership en- d sawing it should be taxed in the town

91 Ky. Cooley Taxation, 2nd ed., p. 374; 1
751; Desty Taxation, § 62.
§ 98;

[20] 1 Desty Taxation, § 62.

[21] Connecticut Gen. Stat., § 2342.

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a leading case:[18] "Partnerships, of course, are composed of individuals. The property belonging to them is the result of contributions made by the individuals engaging in the venture. It is held and used for a common purpose. It is liable to the payment of partnership demands. It can be sold under an execution against the partners to pay a partnership demand. If a member of the firm is financially involved, his interest in the firm can not be taken for his individual obligations to the prejudice of the firm creditors. The firm property is an aggregate of contributions set apart for certain purposes, protected by law against an invasion by individual members of the firm and their creditors. When a member contributes to produce the whole, he does not retain the thing contributed, but acquires an interest with his associates in the whole. He surrenders the individual control of the amount he contributed to that of the members of the firm. The personal property of the firm has an actual situs in Louisville, where the business was conducted. It has a visible and tangible existence. Two-thirds has been taken from the domicile of the owners, and an actual permanent situs is fixed in Louisville. The character of the ownership in the property as well as its situs has been voluntarily changed. In doing this, the members of the firm living outside of the city committed their property to the protection of the municipal authorities, and at the same time made it liable to the payment of taxes to support the municipality. As has been said, a firm for the purposes of taxation, is a 'distinct entity.' In many states the statutes provide that the property of a firm shall be assessed in the firm name. We do not think it necessary to have a statute of that kind in order that a firm may be required to list and pay taxes on the property in the name of the firm. It can not be that, simply because some of the members of the firm are domiciled outside of the corporate limits of the city, the property belonging to it must be assessed in the individual names of those comprising it according to the value of the interest which each has therein. * * * It would be an anomalous condition that the law would authorize the municipal authorities to assess

[18] City of Louisville v. Tatum, 111 Ky. 747, 64 S. W. 836.

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the property of a partnership in the firm name when they all lived in the city, and would forbid them from doing so when a member lived in the city and two or more outside of its corporate limits. * * * If a member of a firm has assessed in his name his interest in firm property, and fails to pay his taxes, and it becomes necessary to seize and sell his property to pay them, the collecting officer could not sell the firm property to pay the taxes due by him, but only his interest in the firm property. To thus assess partnership property would occasion many complications, both in assessment of property and collection of taxes."[19] It is said in Desty on Taxation:[20] "A partnership firm is taxable on its property at the place where the business of the firm is conducted, while the members are severally taxable for their interests where they reside, unless the statute lays down a different rule. The firm and not the individual members of it, is, for the purposes of taxation, considered as owner of its property, and it is to be assessed therefor. Even where the parties reside in different districts, the firm property is taxable at the place where the business is conducted."

§ 939. Place of taxation under statutes of different states. —The situs of partnership property for the purposes of taxation is now prescribed by statute in most jurisdictions. These statutes vary in different states and no general rules as to them can be laid down. A Connecticut statute[21] provides "the property of any trading, mercantile, manufacturing, or mechanical business shall be assessed in the name of the owner or owners in the town, city or borough where the business is carried on." It further provides that the person having charge of the business, if not the owner, shall give in the names of the owners and the valuation is based upon the average amount of goods kept on hand for sale during the year. So the property of a partnership engaged in cutting timber and sawing it should be taxed in the town

[19] Citing Meguiar v. Helm, 91 Ky. 19, 14 S. W. 949, 12 Ky. L. 751; Burroughs Taxation, p. 225, § 98; Cooley Taxation, 2nd ed., p. 374; 1 Desty Taxation, § 62.

[20] 1 Desty Taxation, § 62.

[21] Connecticut Gen. Stat., § 2342.

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where lumber was cut, prepared, stored, and delivered although it carried on its business from an office in another town.[22] The Illinois statute provides that "the personal property of * * * merchants and manufacturers * * * shall be listed and assessed in the county, town, city, village or district where their business is carried on, except such property which shall be liable to assessment elsewhere in the hands of agents." So a firm which is engaged in manufacturing goods at one place, and selling them at another should be assessed at each place on the property there.[23] Another section of this act provides that "the property of manufacturers and others, in the hands of agents, shall be listed and assessed at the place where the business of such agent is carried on." The property used in manufacturing by a firm which manufactures goods at one place through an agent and sells them at another, should be taxed where the goods are manufactured.[24] Under a former Indiana statute requiring the assessment and taxation of steamboats in the county where they belonged or were enrolled or registered, a boat owned by a partnership was held not to be taxable in the town where the partners lived when the boat was used and belonged at another place.[25] A later Indiana statute provides for the taxing of steamboats and other vessels where the owner or one of the owners resides. Under this statute where a boat is owned by a partnership of three members it is proper to tax it at the place where two of the partners live and it can not be taxed again at the place where the third partner lives.[26] A former Kansas statute[27] provided for the listing of personal property in the township or city where the person charged with the tax resided. Partnership property used in one county by a firm whose members lived in another was held taxable only in the county where the members lived.[28] Another Kan-

[22] Jackson v. Town of Union, 82 Conn. 266, 73 Atl. 773.

[23] Selz v. Cagwin, 104 Ill. 647; Illinois Rev. Stat. 1893, ch. 120, § 13.

[24] Selz v. Cagwin, 104 Ill. 647.

[25] Eversole v. Cook, 92 Ind. 222; Act Dec. 21, 1872.

[26] Ind. Rev. Stat. 1881, § 6293; Cook v. Port Fulton, 106 Ind. 170, 6 N. E. 321.

[27] Kansas Gen. Stat., p. 1023.

[28] Griffith v. Carter, 8 Kans. 565.

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sas statute[29] provides for the listing of the property of a corporation or firm by the principal accounting officer or by an agent or partner thereof. Where two partners owning a bank resided in different counties but the bank was located in the county where the cashier and principal officer resided the property was all liable to taxation in the latter county.[30] Under a Maine statute[31] providing for the joint taxing of partners in business whether residing in the same or different towns under their partnership name in the town where the business is carried on for all personal property employed in the business except that property employed in trade in the erection of buildings or vessels or in mechanic arts should be taxed in the town where so employed, it was held that where all the business of a partnership was carried on in one town they could not be taxed in another town for lumber which had been "stuck up" there to season, although it was sawed there and was to stay there until sold.[32] Another statute[33] provided for the taxing of partnership property in the town where the business is carried on and it was held that under it a partnership which carried on a lumber business in one place could not be taxed in another place, for lumber piled on the wharf there to season.[34] The Maryland Constitution[35] provides for the taxing of goods at the owner's residence unless the goods are permanently located in a certain place. It is held that the stock in trade of a partnership in a mercantile business which remains there until sold is permanently located there for the purpose of taxation.[36] By a Minnesota statute[37] "personal property pertaining to the business of a merchant or manufacturer shall be listed in the town or district where his business is carried on," and under this it is held that where a lumbering and manufacturing partnership carries on its principal business in

[29] Kansas Acts 1874, § 7.
[30] Swallow v. Thomas, 15 Kans. 66.
[31] Maine Rev. Stat., ch. 9, §§ 22, 13,
[32] McCann v. Minot, 107 Maine 393, 78 Atl. 465.
[33] Maine Rev. Stat. 1857, ch. 6, § 21.
[34] Stockwell v. Brewer, 59 Maine 286.
[35] Maryland Constitution, art. 3, § 51.
[36] Hopkins v. Baker, 78 Md. 363, 28 Atl. 284, 22 L. R. A. 477.
[37] Minn. Gen. Stat. 1894, § 1516.

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one place, but keeps a stock of merchandise, and carries on a lumber business at another place, it may be taxed in the latter place for the personal property there located.[38] It has also been held under this statute that nonresident partners engaged in the lumber business, which had its principal place of business and a sawmill in one county, and in another county some personal property which was there merely for the cutting and hauling logs to its sawmill, is not taxable in the latter county for the property there located.[39] Under a Nebraska statute,[40] which provides among other things for the taxing of the capital stock and franchises of corporations and persons at the principal office or place of business in the state, and that personal property includes every tangible and intangible thing which is the subject of ownership and is not real property, it was held that credits of a partnership whose members were nonresidents, and which had its principal place of business in another state, but had an office in Nebraska, were taxable at the place of location of the Nebraska office, though the notes taken by the agent in Nebraska for loans made in that state were made payable in another state.[41] It has been held under a New York act[42] which provided for the taxation in New York of all nonresident persons and associations doing business there on the money engaged in the business, that a partnership is taxable in New York on its property there, although its business there is only a branch, tributary to that carried on abroad.[43] A more recent law provides: "Nonresidents of the state doing business in the state, either as principals or partners, shall be taxed on the capital invested in such business as personal property at the place where such business is carried on, to the same extent as if they were residents of the state."[44] In

[38] State ex rel. Twin Lakes v. Hynes, 82 Minn. 34, 84 N. W. 636.

[39] State ex rel. St. Louis County v. Dunn, 86 Minn. 301, 90 N. W. 772.

[40] Nebraska Comp. Stat. 1909, ch. 77.

[41] Clay v. Douglas County, 88 Nebr. 363, 129 N. W. 548, Ann. Cas. 1912 B, 756.

[42] New York Laws 1855, ch. 37, p. 44.

[43] In re McMahon, 66 How. Pr. (N. Y.) 190.

[44] Laws 1896, ch. 908, § 7. See also People v. Wells, 85 App. Div. 440, 83 N. Y. S. 387.

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Oklahoma, a statute which provides that a person moving into the state between March 1 and September 1 is assessable on his personal property which acquires an actual situs before September 1,[45] applies to a partnership with one nonresident member which moves into the state with personal property between March 1 and September 1, although one partner was a resident of the state before March 1.[46] Under a Vermont statute partners in mercantile or other business might be assessed jointly in their partnership name in the town where the business was carried on, for all personal property employed in the business, whether they resided in the same or different towns,[47] and it was held that where the partners all resided in the same town, but one resided in a school district different from the place of business, no part of the partnership property could be taxed in any other school district except where the business was carried on.[48] The Virginia statute provides for the assessment to the firm of partnership property,[49] and it is held that a partnership is an entity for the purposes of taxation, and that its property not otherwise taxed is taxable in the county or city where its business is conducted, and that where a partnership carries on separate and distinct businesses, the property in each business should be taxed in the county or city where it is conducted, and not at the partner's residence.[50] The Wisconsin statute provides for the assessment of most kinds of personal property in the district where located, for the assessment of the property of a nonresident, in the district in which the agent of the owner resides, otherwise, in the district where it is located, and for the assessment of merchants' goods and commodities kept for sale in the district where located.[51] It is held that lumber which was bought by a nonresident partnership and piled at a place in the state from which it is shipped to persons who order from the firm's place of business in another

[45] Oklahoma Act March 10, 1909, art. 2, § 2.

[46] Bivins v. Bird, 31 Okla. 286, 121 Pac. 1080.

[47] Vermont Tax Act 1841, § 12.

[48] School District v. Kittridge, 27 Vt. 650; Fairbanks v. Kittredge, 24 Vt. 9.

[49] Virginia Code, §§ 492, 494, 143.

[50] Commonwealth v. Schmelz, 114 Va. 364, 76 S. E. 905.

[51] Wisconsin Rev. Stat., § 1040.

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state, is merchants' goods, and taxable at the place where located.[52] The same rule was applied to posts, ties and poles piled and kept by a resident partnership, though sold at a place of business away from the location.[53]

§ 940. Massachusetts cases.—A former Massachusetts statute[54] provided that "partners in mercantile or other business, whether residing in the same or different towns, may be jointly taxed under their partnership name in the town where their business is carried on, for all the personal property employed in such business, and if they have places of business in two or more towns, they may be taxed in those several towns for the proportions of property employed in such towns respectively." Under this statute it was held that a firm which was engaged in the law book business in the city of Boston, was not taxable in Cambridge, though it kept stereotyped plates stored, and where it had some printing and binding done by firms which leased buildings from it.[55] It was held that a ship belonging to a partnership and used in its business should be taxed to the partners jointly at their place of business, and not taxed to them separately under another statute which provided for the taxing of vessels to the owners in the town where they reside.[56] All of the property held in trust for the members of an unincorporated association who were held to be partners was taxable where the business was carried on.[57] Under this statute "the right to tax property as trust or as partnership property depends upon what the character of the property taxed really is," and if property is really trust property managed by trustees, it is taxable as such.[58] Under another statute[59] the property of a joint stock concern partnership was taxable at the

[52] Sanford v. Spencer, 62 Wis. 230, 22 N. W. 465.

[53] Torrey v. Shawano County, 79 Wis. 152, 48 N. W. 246.

[54] Massachusetts Rev. Stat., ch. 7, § 13.

[55] Little v. Cambridge, 9 Cush. (Mass.) 298.

[56] Peabody v. Essex, 10 Gray (Mass.) 97; Massachusetts Stat. 1839, ch. 139, § 2.

[57] Williams v. Boston, 208 Mass. 497, 94 N. E. 808; Massachusetts Rev. Laws, ch. 12, § 27.

[58] Williams v. Milton, 215 Mass. 1, 102 N. E. 355.

[59] Massachusetts Public L. 85, ch. 11, § 20, clause 5.

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place where its business was carried on without regard to the residence of shareholders or to the fact that the property was held in trust for the concern.[60] Another statute[61] provided that where partners have places of business in more than one town they shall be taxed in each of such places for the proportion of the property there employed. And under this it was held where a partnership was engaged in manufacturing and selling starch in three towns in one of which goods manufactured there were stored and shipped to purchasers the property there stored was taxable there although the sales of such property were made at an office at another town.[62] Where the members of a partnership lived in one town, had a box factory there, and in another town owned a permanent sawmill, dam, and mill privilege where they sawed boards which were used to manufacture boxes in the factory, they could be taxed in the town where the sawmill was located for their property there.[63] So the property of a partnership situated in Maine where it had a factory was held to be taxable in a Massachusetts city where it had an office, and not at the place where the partners resided.[64] Where the principal place of business of a firm is in one town but they had a contract with the superintendent of the State Reformatory at another town to manufacture shoes there and had some men employed there outside of the reformatory they could not be taxed at the town where the reformatory was located for the property used there.[65] The property of a partnership which dealt in live stock was held to be taxable at the place of the partners' residence where the principal place of business was located and not at a town where it sold stock from the stockyards and had an office in common with other dealers.[66] If a

[60] Ricker v. American Loan & Trust Co., 140 Mass. 346, 5 N. E. 284.

[61] Massachusetts Pub. Stat., ch. 11, § 24.

[62] Barker v. Watertown, 137 Mass. 227.

[63] Duxbury v. Plymouth County, 172 Mass. 383, 52 N. E. 535.

[64] Spinney v. Lynn, 172 Mass. 464, 52 N. E. 523.

[65] Cloutman v. Concord, 163 Mass. 444, 40 N. E. 763.

[66] Farwell v. Hathaway, 151 Mass. 242, 23 N. E. 849.

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partnership merely sends hats to a mill in a town where the partners neither live nor carry on business, to be finished under contract, the partners can not be taxed there on the hats as hiring or occupying a manufactory in such place, although the hats were sorted and counted there.[67] The property of a joint stock association is taxable at the place where its business is carried on and not to each partner at his residence.[68] The interest of a resident of Massachusetts in a partnership which does business in another state is taxable in Massachusetts under the general rule that all property real and personal of the inhabitants of a state shall be subject to taxation.[69]

§ 941. **Michigan cases.**—An early Michigan statute[70] provided for the taxation of merchandise and stock in trade used in a township other than that of the residence of the partners, if the owners hired or occupied a store there, in the township where the goods were located, and that partners might be jointly taxed under the partnership name in the township where their business was carried on for the personal property used in the business, and if they have places of business in more than one township, then in each township for the proportion of the property used in each township. And it was held that a partnership which had a general place of business in one township could not be taxed in another township where lumber was sawed for it under contract, and piled and stored under the supervision of one of their employés.[71] A later act,[72] provides for the taxation of goods where situated, and that a partnership shall be deemed to reside in the township where its business is principally carried on, and under this act, all of partnership property is taxable in the township where the partners reside, and the principal place of business is located, and the partnership can

[67] Lee v. Templeton, 6 Gray Mass. 579; Massachusetts Rev. Stat., ch. 7, § 10, clause 1.

[68] Hoadley v. Essex, 105 Mass. 519.

[69] Bemis v. Board of Aldermen, 14 Allen (Mass.) 366.

[70] Michigan Comp. Laws, §§ 974, 978.

[71] McCoy v. Anderson, 47 Mich. 502, 11 N. W. 290; Putman v. Fife Lake, 45 Mich. 125, 7 N. W. 699.

[72] Michigan Tax Law 1882, §§ 5, 10, 11.

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not be taxed in another township for logs which were there for sawing,[73] nor for lumber piled for transit along a railroad,[74] or still on the premises of a manufacturer with whom the partnership had contracted for its purchase.[75] Although the partners did not reside there, it was held that partnership property should be taxed at the place where it was located, and where the principal business of the firm was carried on.[76] The personal property of a partnership after the death of a partner was held to be taxable, where the business was still carried on, at the place where the concern had its place of business, although some of the personal property was elsewhere located, and it was not taxed to the survivor at another place, where he resided.[77] So it has been held that the business of a partnership is principally carried on at the place where its books were kept, and reports of the business in other places were daily sent, although it had mills and lumber yards in other places, and had a number of tugs, vessels and barges at different points in the freight business.[78] The personalty of a partnership association formed by the heirs of a deceased person is held taxable at the place where in the articles of association, its principal office is stated to be located, and where an office was actually held, although it had an office in another place, and did the bulk of its business there, the decision being influenced by the law in regard to the taxation of corporate property at the place where its office is located in its articles of incorporation.[79]

§ 942. **Taxation after dissolution.**—Dissolution of a partnership does not affect the right to enforce a tax previously levied on its taxable property.[80] So a tax assessed after dissolu-

[73] Torrent v. Yager, 52 Mich. 506, 18 N. W. 239.

[74] Monroe v. Greenhoe, 54 Mich. 9, 19 N. W. 569.

[75] Osterhout v. Jones, 54 Mich. 228, 19 N. W. 964.

[76] Williams v. Saginaw, 51 Mich. 120, 16 N. W. 260.

[77] Blodgett v. Muskegon, 60 Mich. 580, 27 N. W. 686.

[78] Nester v. Baraga, 133 Mich. 640, 95 N. W. 722.

[79] Detroit v. Lathrop Estate Co., 136 Mich. 265, 99 N. W. 9; Michigan Comp. Laws, § 3834.

[80] Blodgett v. Muskegon, 60 Mich.

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tion and paid under protest can not be recovered, it is held, if the firm had property, or its affairs were not wound up,[81] though it has also been held improper to assess a firm after due notice of dissolution.[82] And a partner is liable to a copartner whose interest he had bought for taxes paid by the copartner after dissolution in order to avoid seizure.[83] It is a partner's duty to pay taxes due prior to a dissolution, and one who rented a copartner's share after dissolution can not escape payment of rent by allowing an undivided half interest in firm property to be sold for taxes due prior to the sale even though the copartner was unwilling for such taxes to be paid.[84] A purchaser of a partner's interest who assumes firm liabilities is bound to pay the taxes outstanding against the retiring member's share.[85] A partner who disposes of his interest in the firm before assessment time is not liable for taxes,[86] nor is a partner liable to the other partners for taxes paid by the firm on capital borrowed from him.[87] It has been held that after death of a partner, if the business is continued by the surviving partner, it is properly listed for taxation in the firm name.[88] In Louisiana, property owned by one of the partners can not be seized after dissolution to pay taxes owed and assessed to the partnership, and after dissolution of a particular partnership each partner owes half the tax.[89]

§ 943. Taxation of property of joint stock company.—The property of a joint stock association which is a partnership is taxable at its place of business, without regard to the place of residence of the members.[90] Under a statute applicable to com-

580, 27 N. W. 686; Robinson v. Ward, 13 Ohio St. 293.

[81] Oliver v. Lynn, 130 Mass. 143.

[82] Von Phul v. New Orleans, 24 La. Ann. 261.

[83] Evans v. Bradford, 35 Ind. 527.

[84] Chapin v. Streeter, 124 U. S. 360, 8 S. Ct. 529, 31 L. ed. 475.

[85] Wheat v. Hamilton, 53 Ind. 256.

[86] Washburn v. Walworth, 133 Mass. 499.

[87] Conn v. Conn, 22 Ore. 452, 30 Pac. 230.

[88] Blodgett v. Muskegon, 60 Mich. 580, 27 N. W. 686.

[89] Rivers v. New Orleans, 42 La. Ann. 1196, 8 So. 484.

[90] Ricker v. American Loan & Trust Co., 140 Mass. 346, 5 N. E. 284; Hoadley v. Essex, 105 Mass. 519.

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panies or associations, it is held a joint stock association is taxable, though a partnership.[91] But such association is not taxable under a statute applying to corporations.[92] The cases on this question are not, however, in uniformity, as it was held that under the Pennsylvania statutes the capital stock of the Adams Express Company, a New York joint stock association, was not taxable as a company incorporated in another state,[93] while it was held in Ohio that this very association may be deemed a corporation for the purpose of taxation, though the law under which it is organized declares that it is not a corporation,[94] and in New Jersey it has been held that a Pennsylvania partnership association doing business in New Jersey is taxable there under the corporation tax act.[95] Where the constitution of a state provides that taxes must be imposed on produce or goods, a tax on shares in a joint stock company is unconstitutional, since such shares are not commodities.[96] Where a partner made a will directing his trustees to continue the business, and leave all the property which he had contributed and to which he was entitled in the firm, and they did so, it was in effect the creation of a new firm and the trust property invested in the firm for the deceased partners estate was not taxable as a debt owed by a firm to the trustees, but as firm property at the place of business of the firm.[97]

§ 944. Notice to redeem from tax sale.—Where a statute requires notice to redeem from tax sale to every person in actual possession or occupancy of land, and also to the person in whose name the land is assessed, if he can be found in the county, it

[91] Oliver v. Liverpool &c. Ins. Co., 100 Mass. 531; People v. Wemple, 117 N. Y. 136, 22 N. E. 1046, 6 L. R. A. 303.

[92] Hoey v. Coleman, 46 Fed. 221; Byers v. Coleman, 46 Fed. 224; People v. Coleman, 133 N. Y. 279, 31 N. E. 96, 16 L. R. A. 183.

[93] Sanford v. Gregg, 58 Fed. 620.

[94] State v. Adams Express Co., 3 Ohio S. & C. P. Dec. 326, 2 Ohio N. P. 98.

[95] Tide Water Pipe Co. v. State Board of Assessors, 57 N. J. L. 516, 31 Atl. 220, 27 L. R. A. 684.

[96] Ricker v. American Loan & Trust Co., 140 Mass. 346, 5 N. E. 284; Gleason v. McKay, 134 Mass. 419.

[97] Stearns v. Brookline, 219 Mass. 238, 107 N. E. 57.

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has been held that where land was assessed to a firm of two partners, and was in the occupation of a third person, a notice to one member of the firm of the sale of the land for taxes was not good as to the rights of the other member, and the tax deed obtained as a result of such sale is voidable.[98] If the statute requires notice to redeem from tax sale to the person in whose name the land is taxed or assessed, notice to a person who was not conclusively shown to be a member of the firm, of the sale of land assessed in a firm name, is insufficient, and a deed based on such sale is void.[99].

[98] Gage v. Reid, 118 Ill. 35, 7 N. E. 127.

[99] Hughes v. Carne, 135 Ill. 519, 26 N. E. 517.

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CHAPTER XXIX

CHANGE OF PARTNERSHIP INTO CORPORATION

SECTION

950. Advantages and disadvantages of corporation and partnership contrasted.
951. Changing partnership into corporation.
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967. Rights of creditors when partnership property is transferred to a corporation.
968. Transfer of partnership property to corporation made to hinder and delay creditors.

§ 950. Advantages and disadvantages of corporation and partnership contrasted.—There are various differences in the manner of management of partnerships and corporations and the liabilities of their members, which often lead partners to incorporate their business and change it into a corporation. Among some of these differences may be enumerated the following: Each partner is an agent of the firm, and has the power to bind it within the scope of its business, while a corporation acts through its accredited officers only, and is bound only by their acts. Each

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partner individually is liable to an unlimited extent for all the debts and obligations of the firm, while the property of a corporation is liable primarily for its debts, and in the ordinary corporation a stockholder who has paid for his stock is not liable individually, and if he has not paid for it is liable only to the extent of his subscription. The share of a partner is indivisible, and nontransferable, while the system of issuing stock of corporations permits exact ascertainment of a stockholder's interest, and its transfer by assignment. The management of a corporation is fixed by its charter and by-laws, and the statutes of the state of incorporation, and is more definite and certain than that of a partnership, where the power of management can only be regulated by agreement of the partners, and where each partner exercises to a large extent the full powers of the firm. As a rule the expense of forming a corporation is greater than that of the formation of a partnership, since there are fees to be paid the state for the privilege of incorporation, filing the certificate and similar expenses, and certain special books and corporate equipment must be purchased. Also in many states a corporation is subject to a special franchise tax, or a tax is levied on the stock from the books of the corporation, so that often the taxes on corporate property may be higher than on partnership property. Usually corporations are subject to more strict governmental regulation than partnerships. The rights of the minority members are usually greater, and more easily enforced, in a partnership than in a corporation, for the ordinary corporation is controlled by the holders of a majority of the stock, and their action is absolutely binding on the holders of the minority stock, if not illegal, while in a partnership of two members only, the dissent of one member to some question of policy will ordinarily prevent its being carried out, and in any partnership, the member who is dissatisfied is generally held to have a right to dissolve the partnership at any time. In a corporation the only relief of a minority stockholder is to sell his stock, which may be of very little value, because of the very action of the majority which causes him to wish to withdraw. A partnership is dissolved by

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the death or bankruptcy of a member; these have no effect on the continuance of a corporation. The advantages of the corporation then are the limitation of liability, continuous existence, and the ease of transfer of a member's interest; the advantages of the partnership are greater personal participation in the business and greater protection for the rights of the individual members. On the other hand if there has been an unwise choice of partners, and their relations are inharmonious or if one of them is unscrupulous or dishonest, in spite of the legal requirement that he exercise perfect good faith, his power to injuriously affect the business is much greater than that of any number of stockholders of a corporation less than a majority. The greater rights of a partner to take part in the management of the business carry with them an unlimited liability; the limited rights of the stockholders in a corporation may be compensated for by his limited liability.

§ 951. Changing partnership into corporation.—In order to incorporate a partnership business, the partners should first agree upon the details of the change. Among matters which should be considered are the name of the corporation, the capital stock, the share of each partner in the stock, his representation as a director of the corporation, or as one of its officers, the salary each is to receive, and arrangements as to the property of the partnership, or as to its transfer to the corporation. Usually if the firm name is of value it may be substantially retained as the corporate name, by the addition of the words "company," or "incorporated." As many of the special features of the incorporation as possible should be made provisions of the charter, while other provisions must appear in the by-laws of the corporation, which are its working rules, containing details of procedure for the transaction of corporate business, such as the time for the annual meeting, times for directors' meetings, powers and duties of officers, powers of directors, paying of dividends, or other special provisions which either have not been placed in the charter, or, because of statute are not proper charter provisions. Ordinarily it is possible to provide by means of the by-laws for the issue of preferred or special stock. The by-laws are generally

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subject to amendment by a specified vote of the stockholders. The usual steps after securing a charter are to hold a stockholders' meeting, at which by-laws are adopted, and directors elected, in the states where the first directors are not named in the charter, and to follow this by a directors' meeting, at which the officers are elected, and any action taken necessary to begin the corporate business, such as to lease offices, designate a bank as a depository, and to issue stock in exchange for partnership property, in accordance with a preliminary agreement. As a general rule the better manner of transferring the business is to bring before the first stockholders' meeting a written proposal from all the members of the partnership, offering the partnership property and assets in return for corporate stock, which should be approved by the stockholders, and referred to the directors, who accept the proposition and enter its acceptance on the minute books of the corporation. Usually after the acceptance of the offer, a formal assignment of the business is executed and delivered to the officers of the corporation. The acceptance of the written proposal would pass title, however, it seems.[1] It is not necessary to issue stock certificates to give the former partners the privileges and rights of stockholders, since this is secured by the written proposal and acceptance,[2] but it is better to make out the certificates for the shares of each partner. It is also well to notify the persons who have formerly dealt with the firm that the partnership is dissolved, in order to escape further partnership liability.[3] After these formalities, the business will be conducted as a corporate business, though if composed of but a few stockholders, all of whom are active in the business, there is need in all ordinary business for but little more formality than in the old partnership, and the business may be conducted largely in the old manner, although the corporate machinery is there for

[1] Central Ohio Natural Gas &c. Co. v. Capital City Dairy Co., 60 Ohio St. 96, 53 N. E. 711, 64 L. R. A. 395.

[2] Cook Corp., § 192.

[3] Whitney v. Wyman, 101 U. S. 392, 25 L. ed. 1050; Shorb v. Beaudry, 56 Cal. 446; Garnett v. Richardson, 35 Ark. 144; Goddard v. Pratt, 16 Pick. (Mass.) 412; Farmers' Bank v. Smith, 26 W. Va. 541.

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protection in case of insolvency of the company or a member, or of death of a member, or transfer of his interest.

§ 952. **Protection of minority interests.**—In changing a partnership into a corporation, there are various devices which may be made use of to protect minority interests. One is an equal division of the voting stock, while the excess investment of any of the former partners is cared for by nonvoting stock. By this scheme there is equality of voting power, while dividends are shared in proportion to the total stock of each member. Cumulative voting is allowable in most states. By this the minority is assured of representation. Under this system, while each share of stock entitles its holder to but one vote for each director to be elected, he may cumulate these votes on one or more of the candidates. For instance, if a stockholder has one hundred shares, and there are five directors to be elected, instead of casting one hundred votes for each five men, he may cast five hundred votes for one man. Voting trusts, under which a majority or all of the stock of a corporation is placed in the hands of trustees who hold it in trust for the stockholders, and vote it as directed in the trust agreement, are sometimes resorted to in order to preserve an agreed management for a term of years, but statute usually limits the time for which these trusts may be in force. Agreements restricting the sale of stock may be entered into in some states, so as to prevent its coming into the hands of persons who would be undesirable as business associates. In some of the means suggested above, counsel will usually find it possible to provide for more effective minority representation and protection among corporate stockholders.

§ 953. **Liability of corporation succeeding partnership for debts of partnership.**—The discussion here will be limited strictly to the general subject of a corporation that has been formed by partners and has taken over the partnership assets. In such a case it must be remembered that a corporation is a distinct person in law from the partnership; and the promises and obligations of such former partnership are not the promises and

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obligations of the corporation. The general rule is that the succeeding corporation is not liable for the debts and obligations of the prior partnership, in the absence of adoption and ratification; or unless there has been a fraudulent transfer by the partners to the corporation.[4] A corporation lawfully acquiring the property of a partnership does not necessarily become liable for the partnership debts.[5] It is true that the assets of the partnership, under such circumstances remain pledged in a certain sense to the payment of the firm debts, and equity will subject such assets in the possession of the new corporation to the payment of such debts, and the transfer may be fraudulent as against the firm creditor.[6] Though a corporation acquires all the property of a partnership it does not by that transaction make itself responsible for the partnership debts,[7] unless the corporation has expressly or impli-

[4] Georgia Co. v. Castleberry, 43 Ga. 187; McLellan v. Detroit File Works, 56 Mich. 579, 23 N. W. 321; Church v. Church Cementico Co., 75 Minn. 85, 77 N. W. 548; Hall v. Baker Furniture Co., 86 Nebr. 389, 125 N. W. 628; Austin v. Tecumseh Nat. Bank, 49 Nebr. 412, 68 N. W. 628, 35 L. R. A. 444, 56 Am. St. 543n; Reed Bros. Co. v. First Nat. Bank, 46 Nebr. 168, 64 N. W. 701; Paxton v. Bacon Mill & Min. Co., 2 Nev. 257; Bradley Fertilizer Co. v. South Pub. Co., 17 N. Y. S. 587, 44 N. Y. St. 119; Byrne Hammer Dry Goods Co. v. Willis-Dunn Co., 23 S. Dak. 221, 121 N. W. 620, 29 L. R. A. (N. S.) 589; Durlacher v. Frazer, 8 Wyo. 58, 55 Pac. 306, 80 Am. St. 918. See Bruffett v. Great Western R. Co., 25 Ill. 353; Tawas &c. R. Co. v. Iosco Circuit Judge, 44 Mich. 479, 7 N. W. 65; Memphis Water Co. v. Magens, 15 Lea (Tenn.) 37; Donnally v. Hearndon, 41 W. Va. 519, 23 S. E. 646.

[5] Culberson v. Alabama Const. Co., 127 Ga. 599, 56 S. E. 765, 9 L. R. A. (N. S.) 411n.

[6] McVicker v. American Opera Co., 40 Fed. 861; Blair v. St. Louis &c. R. Co., 24 Fed. 148; Blair v. St. Louis &c. R. Co., 22 Fed. 36; Fogg v. St. Louis &c. R. Co., 17 Fed. 871, 5 McCrary (U. S.) 449; Brum v. Merchants' Mut. Ins. Co., 16 Fed. 140, 4 Woods 156; Hibernia Ins. Co. v. St. Louis &c. Transp. Co., 13 Fed. 516, 4 McCrary (U. S.) 432; Harrison v. Union Pac. R. Co., 13 Fed. 522, 4 McCrary (U. S.) 264; Heman v. Britton, 88 Mo. 549; Vance v. McNabb Coal &c. Co., 92 Tenn. 47, 20 S. W. 424; Thompson v. Abbott, 61 Mo. 176; National Bank v. Texas Investment Co., 74 Tex. 421, 12 S. W. 101; Island City Sav. Bank v. Sachtleben, 67 Tex. 420, 3 S. W. 733.

[7] Smith v. Bowker Torrey Co., 207 Fed. 967; Pearce v. Sutherland, 3 Alaska 303; Greenberg-Miller Co. v. Everett Shoe Co., 138 Ga. 729, 75 S. E. 1120; Stewart v. Mynatt, 135 Ga. 637, 70 S. E. 325 (corporation not

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edly assumed liability for such debts.[8] This is the case where the corporation has the same name as the partnership it supersedes and transacts the same kind of business.[9] The fact that the members of a partnership and of the succeeding corporation were the same, is not of itself sufficient to hold the corporation liable.[10]

§ 954. When corporation is liable for debts of partnership which it succeeds.—It is not to be understood from the preceding section that a corporation succeeding a partnership and taking the firm assets, is in no event liable for the partnership debts. The authorities show that under such circumstances the corporation will be liable in certain events: (1) Where the liability results from a contract relation with the partnership.[11] (2) Where the transfer of the property and franchise amounts to a fraud upon the creditors of the partnership.[12] (3) Where the circumstances attending the creation of the new corporation and its succession to the business and property of the firm, are such as to raise the presumption or warrant the finding that such corporation is a mere continuation of the former, the same corporate body under a different name; but the facts upon which such finding or presumption depends will not be presumed, but

liable for injuries to person on premises of partnership afterward changed to a corporation); Culberson v. Alabama Const. Co., 127 Ga. 599, 56 S. E. 765, 9 L. R. A. (N. S.) 411n, 9 Ann. Cas. 507; Byrne &c. Dry Goods Co. v. Willis-Dunn Co., 23 S. Dak. 221, 121 N. W. 620, 29 L. R. A. (N. S.) 589n; Brooks v. Bonner (Tex. Civ. App.), 149 S. W. 564; Ziemer v. C. G. Bretting Mfg. Co., 147 Wis. 252, 133 N. W. 139, Ann. Cas. 1912 D, 1275n.

[8] Brautigam v. Dean, 85 N. J. L. 549, 89 Atl. 760.

[9] Bludwine Bottling Co. v. Crown Cork &c. Co., 14 Ga. App. 285, 80 S. E. 853.

[10] Georgia Co. v. Castleberry, 43 Ga. 187; McLellan v. Detroit File Works, 56 Mich. 579, 23 N. W. 321; Schufeldt v. Smith, 139 Mo. 367, 40 S. W. 887; Campbell v. Farmers' & Merchants' Bank, 49 Nebr. 143, 68 N. W. 344.

[11] Austin v. Tecumseh Nat. Bank, 49 Nebr. 412, 68 N. W. 628, 35 L. R. A. 444, 56 Am. St. 543n; National Bank v. Hollingsworth, 135 N. Car. 556, 47 S. E. 618; Friedenwald Co. v. Asheville Tobacco Works &c., 117 N. Car. 544, 23 S. E. 490.

[12] Hibernia Ins. Co. v. St. Louis &c. Transp. Co., 13 Fed. 516, 4 McCrary 432; Baker Furniture Co. v. Hall, 76 Nebr. 88, 107 N. W. 117, 111 N. W. 129, 113 N. W. 267; Austin v. Tecumseh Nat. Bank, 49 Nebr.

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must affirmatively appear.[13] The mere knowledge of a corporation taking over the assets of an unincorporated association, that a third person was continuing certain work on which such unincorporated association had agreed to make payment, has been held not alone sufficient to make the corporation liable for such work.[14] An assumption of the partnership debts is not presumed from the fact of the sale and transfer of property by a partnership to a corporation composed of stockholders, some of whom are members of the partnership and others are not.[15] The partnership is not ipso facto terminated by the organization of a corporation and the transfer to it of the partnership assets. It may be terminated, however, and merged in the corporation by the distribution of the corporate stock and bonds according to the respective interests of the partners.[16] A corporation may become liable for the partnership debts where it expressly or impliedly assumes the debts in taking over the partnership assets.[17] So the corporation may be charged with liability where the change from the partnership to the corporation amounts to no more than a mere continuation under a new name and the books of the partnership are continued by the corporation.[18] The former partners who continue as stockholders in the new corporation may resort to equity to compel the corporation to perform its agreement of

412, 68 N. W. 628, 35 L. R. A. 444, 56 Am. St. 543n; Booth v. Bunce, 33 N. Y. 139, 88 Am. Dec. 372.

[13] Baker Furniture Co. v. Hall, 76 Nebr. 88, 107 N. W. 117, 111 N. W. 129, 113 N. W. 267; Austin v. Tecumseh Nat. Bank, 49 Nebr. 412, 68 N. W. 628, 35 L. R. A. 444, 56 Am. St. 543n; Reed v. First Nat. Bank, 46 Nebr. 168, 64 N. W. 701; National Bank v. Hollingsworth, 135 N. Car. 556, 47 S. E. 618; Friedenwall Co. v. Asheville Tobacco Works &c., 117 N. Car. 544, 23 S. E. 490; Andres v. Morgan, 62 Ohio St. 236, 78 Am. St. 712; Texas Loan Agency v. Hunter, 13 Tex. Civ. App. 402, 35 S. W. 399.

[14] Dingeldein v. Third Ave. R. Co., 9 Bosw. (N. Y.) 79. See Allen v. Frumet Min. &c. Co., 73 Mo. 688.

[15] Swing v. Taylor, 68 W. Va. 621, 70 S. E. 373.

[16] Watkins v. Delahunty, 133 App. Div. 422, 117 N. Y. S. 885.

[17] In re A. G. Crosby Co., 199 Fed. 344; Leckie v. Bennett, 160 Mo. App. 145, 141 S. W. 706; Modern Dairy &c. Co. v. Blanke &c. Supply Co. (Tex. Civ. App.), 116 S. W. 153.

[18] Curtis v. Smelter Nat. Bank, 43 Colo. 391, 96 Pac. 172.

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assumption,[19] but an agreement by a corporation to take over the business and pay the debts of a copartnership can not be enforced by creditors of the copartnership not parties to the transaction.[20]

§ 955. Corporation liable for debts of partnership—Illustrations.—A few cases show the circumstances under which the corporation was held liable for the debts of the partnership and sufficiently illustrate the principle of the preceding section. Thus, where a corporation succeeded a partnership, an agreement that it should take all the assets and assume all the liabilities of the firm, which was accordingly done, as shown by its books, was held sufficient to make such debts the obligations of the corporation, though the records kept by the directors and stockholders showed only the purchase of a part of the assets of the firm in payment of stock.[21] And where a merchant heavily indebted, organized a corporation and transferred to it all his property, and took practically all the stock and on whom the by-laws conferred complete control of the corporation, was held not sufficient to show that the corporation had assumed his debts, though he and at least one of the directors so understood it, and where it appeared that he had paid some of his former debts with the money of the corporation, and had pledged its credit to secure others.[22] So where a surviving partner organized a corporation and transferred to it the firm assets and took stock in payment therefor, the corporation was held liable upon a note endorsed in the firm name without authority.[23] Where a corporation took the assets of a firm under an agreement that it would assume and pay the firm liabilities to the extent of the assets received, it was held that the corporation could not be made liable on a debt due one of the partners until it was ascertained that the assets

[19] Forbes v. Thorpe, 209 Mass. 570, 95 N. E. 955.

[20] Morgan v. Randolph-Clowes Co., 73 Conn. 396, 47 Atl. 658, 51 L. R. A. 653. See, however, Leckie v. Bennett, 160 Mo. App. 145, 141 S. W. 706. It must be borne in mind that the foregoing cases illustrate the English rule.

[21] Schufeldt v. Smith, 139 Mo. 367, 40 S. W. 887.

[22] Durlacher v. Frazer, 8 Wyo. 58, 55 Pac. 306, 80 Am. St. 918.

[23] National Bank v. Hollingsworth, 135 N. Car. 556, 47 S. E. 618.

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exceeded the liability.[24] "A careful examination of the authorities," said the North Carolina court, "fails to disclose any case in which the principle upon which a new corporation becomes liable by reason of taking assets in the old corporation or a partnership is applied to the transfer of property by an individual in payment of his subscription to the capital stock of the corporation, in the absence of any finding that such transfer was made with intent to defraud his creditors."[25] The Supreme Court of Nebraska has held that the rule that equity will not permit a corporation to receive all the assets of an insolvent partnership in consideration of the corporate stock and hold such assets free from claims of partnership creditors is without application where a corporation is formed by such partners and a third person, who in good faith and in the well-grounded belief that the partnership debts are satisfied, invests in the reorganization and receives corporate stock therein. In such a case the creditors may seize only the interest of the partners to satisfy the partnership debts.[26]

§ 956. Transfer of assets of partnership to succeeding corporation.—Not infrequently an existing partnership is organized into a corporation, the members of the partnership becoming the stockholders of the new company and the firm property constituting the capital stock of the corporation. The mere fact of the organization of a corporation in such manner does not of itself effect a transfer of the firm property. The members of a firm, by the mere act of incorporating themselves by the same name, can not invest the corporation with title to the property owned by the firm. There is authority to show that real estate of a firm can not thus be transferred, and it may well be doubted, if personal property of a firm can thus become the property of the corporation, as between such corporation and third persons.[27]

[24] Adams v. Empire Laundry Mach. Co., 52 Hun (N. Y.) 610, 4 N. Y. S. 738, 22 N. Y. St. 271.

[25] National Bank v. Hollingsworth, 135 N. Car. 556, 47 S. E. 618.

[26] Hall v. Baker Furn. Co., 86 Nebr. 389, 125 N. W. 628.

[27] Carothers v. Alexander, 74 Tex. 309, 12 S. W. 4.

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A valid and effective transfer of the assets frees the property from all equities as between the former partners, and all partnership liens are extinguished by the transfer; but it does not necessarily divest equities which creditors may have.[28] So an incorporation by a special statute of tenants in common of a wharf, on their own petition, and for the purpose of expediting the management and improvement of the property, was held not to vest the title to the property in the corporation, where such intention did not clearly appear, but a conveyance from the individual to the corporation was necessary.[29] On the other hand, where the owners of land as tenants in common were incorporated by a special statute for the express purpose of improving and selling it, the acceptance of the charter was held to vest the title to the property in the corporation.[30] The conveyance by a partnership of all its property to a corporation organized by the partners for that purpose, and a division between them of the stock, could not be treated as a simulated or sham transfer in an action by the corporation that would oust the jurisdiction of the court.[31]

§ 957. Transfer of partnership assets to corporation—Conveyance necessary.—In the transfer of firm assets to a corporation organized to succeed it in business, it is necessary that some formal transfer be made in order to effectuate a change of title. Usually the mere organization of the corporation by the members of the firm will not of itself operate as a transfer. This is especially true where all the members of the firm did not become members of the corporation, or where the corporation has members other than the members of the firm. In such transfers the property should be described with sufficient certainty to show what particular property or item is transferred.[32] This rule

[28] Francklyn v. Sprague, 121 U. S. 215, 30 L. ed. 936, 7 Sup. Ct. 951; Hoyt v. Sprague, 103 U. S. 613, 26 L. ed. 585.

[29] Leffingwell v. Elliott, 8 Pick. (Mass.) 455, 19 Am. Dec. 343; Holland v. Cruft, 3 Gray (Mass.) 162; Manahan v. Varnum, 11 Gray (Mass.) 405.

[30] Colquitt v. Howard, 11 Ga. 566.

[31] Slaughter v. Mallet Land &c. Co., 141 Fed. 282, 72 C. C. A. 430.

[32] Rau v. Union Paper Mill Co., 95 Ga. 208, 22 S. E. 146; Schneider v.

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is particularly applicable to real estate.[33] Where the statutes provide that a deed is necessary in such circumstances to convey the title, then a formal conveyance is necessary.[34] However, the corporation under some circumstances may acquire an equitable title to the property. Thus, where a corporation succeeding a partnership paid the purchase-price, took possession of the property and made improvements, but no deed was executed, it was held that the corporation acquired an equitable title and had the power to execute a valid mortgage on such real estate.[35] The mere formation of a corporation by a partnership to succeed to its business is not sufficient of itself to give the corporation the right to enforce contracts or sue upon debts due the partnership.[36] In such a case a corporation acquires no better title to the property than that possessed by the partnership.[37] Thus, a corporation receiving a note from the firm which it succeeded was held not to be in the position of a bona fide purchaser of a note transferred to it from such firm, and in an action thereon by the corporation the maker may set up any defense available as against such partnership.[38]

§ 958. Assumption of debts of partnership by succeeding corporation.—Ordinarily, in most jurisdictions at least, to render a corporation liable for the debts of a partnership, which it has succeeded, it must expressly assume the debts of the prior firm and agree to pay them. Still, in such case,

Sellers (Tex. Civ. App.), 81 S. W. 126.

[33] Rau v. Union Paper Mill Co., 95 Ga. 208, 22 S. E. 146; Manahan v. Varnum, 11 Gray (Mass.) 405; Frank v. Drenkhahn, 76 Mo. 508; Hennessy v. Griggs, 1 N. Dak. 52, 44 N. W. 1010; Schneider v. Sellers (Tex. Civ. App.), 81 S. W. 126; McLeary v. Dawson, 87 Tex. 524, 29 S. W. 1044.

[34] Rau v. Union Paper Mill Co., 95 Ga. 208, 22 S. E. 146.

[35] Cooke v. Watson, 30 N. J. Eq. 345.

[36] Scots Charitable Society v. Shaw, 8 Mass. 532; Ruettell v. Greenwich Ins. Co., 16 N. Dak. 546, 113 N. W. 1029.

[37] Woodward v. San Antonio Traction Co. (Tex. Civ. App.), 95 S. W. 76.

[38] McElwee Mfg. Co. v. Trowbride, 62 Hun (N. Y.) 471, 17 N. Y. S. 3, 43 N. Y. St. 238. See also Texas Loan Agency v. Hunter, 13 Tex. Civ. App. 402, 35 S. W. 399.

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in order to hold the corporation liable, the assumption and agreement to pay the debts must be based upon a sufficient consideration. The fact that the corporation receives, or is to receive, the assets of the firm, is a sufficient consideration to support the assumption or the agreement to pay the firm debts.[39] To render the corporation liable for the debts of the firm it must have expressly assumed or ratified or adopted such debts.[40] The assumption of the debts for a sufficient consideration must be shown in order to make the corporation liable.[41] It was held to be sufficient proof of the assumption of partnership debts, where it appeared that there was a verbal agreement between the president of a corporation and the firm which the corporation succeeded, to the effect that the corporation should take all the assets of the partnership and assume its liabilities; and pursuant to such agreement, as shown by the corporation books, that on its organization the corporation did take into its possession all the assets of the partnership, and thereafter disposed of and used them in its business, and placed upon its books as its liabilities all the debts of the partnership, some of which it paid in full and settled others by substituting its own note and paid interest on still other of such debts.[42] The assumption of a contract may be established by showing that the corporation complied with and carried out such contract.[43] So, where a firm transferred its property to a corporation formed by its members, and the corporation passed a vote accepting the property and assuming the debts of the firm, it was held that the corporation, having the power to assume, on a valid consideration, the debts of the firm, did so by its votes and the acceptance of the property, and was accordingly liable to the creditors of the firm.[44] And where a corporation assumed the debts of the partnership

[39] Georgia Co. v. Castleberry, 43 Ga. 187.

[40] Hart Pioneer Nurseries v. Coryell, 8 Kans. App. 496, 55 Pac. 514.

[41] London v. Bynum, 136 N. Car. 411, 48 S. E. 764; National Bank v. Hollingsworth, 135 N. Car. 556, 47 S. E. 618.

[42] Schufeldt v. Smith, 139 Mo. 367, 40 S. W. 887.

[43] Hall v. Herter, 83 Hun 19, 64 N. Y. St. 378, 31 N. Y. S. 692.

[44] Waterman's Appeal, 26 Conn. 96.

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from which it was formed, the fact that the partners afterward gave their notes for certain debts of the firm, was held not to relieve the corporation from liability so as to prevent a preference by it.[45] And where a corporation, organized by the members of a partnership passed a resolution authorizing the purchase of the firm property, and at the same time assumed the firm debts, it was held that the corporation could not, by a secret agreement among the directors that certain claims were not assumed, prevent the firm creditors from proceeding against the corporation.[46] A corporation may assume a contract of the former firm by adopting it through its general manager.[47] But where such a corporation did not undertake to pay the firm debts, it did not, by completing all the work undertaken by such firm thereby assume a contract made by it with a third person for the supervision of such work.[48] The assumption by a corporation of certain specific debts of a partnership, succeeded by a corporation, in consideration of the transfer of certain real and personal property of the partnership, was held to have the effect to postpone the other partnership debts, including taxes, to the payment of the particular debts mentioned.[49] But the debts of an insolvent corporation are not entitled to preference in payment over the debts of the firm assumed by the corporation on the transfer to it of the property of the partnership.[50]

§ 959. Liability of succeeding corporation for partnership debts without express assumption.—There is authority for the rule that a corporation succeeding a firm may become liable for its debts without expressly assuming or agreeing to pay them. Thus, it has been held that the fact that a corporation was organized by the members of a partnership to which all the firm property was tranferred, and all the

[45] Johnston v. Gumbel (Miss.), 19 So. 100.

[46] Williams v. Colby, 53 Hun 637, 6 N. Y. S. 459, 24 N. Y. St. 793, 3 Silv. 337.

[47] Pratt v. Oshkosh Match Co., 89 Wis. 406, 62 N. W. 84.

[48] Hall v. Herter, 83 Hun (N. Y.) 19, 31 N. Y. S. 692, 64 N. Y. St. 378.

[49] Lamkin v. Baldwin &c. Mfg. Co., 72 Conn. 57, 43 Atl. 593, 1042, 44 L. R. A. 786.

[50] London v. Bynum, 136 N. Car. 411, 46 S. E. 764.

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stock issued to such members, and the business continued at the same place, was sufficient to render the corporation liable for the partnership debts, though not expressly assumed.[51] On this subject the Supreme Court of Nebraska said: "It is a rule of the common law that a corporation which succeeds to the business of a copartnership, or a corporation, organized for the purpose of continuing the business, and takes over the assets thereof, by so doing assumes the debts and liabilities of the partnership or corporation which it succeeds, to the extent of the property so received."[52] There are other cases which hold that assumption of liability may be express or implied, and an "agreement on the part of the corporation may be proven, like any other fact, by any competent evidence which will establish either an express or implied valid agreement to assume the liabilities."[53]

§ 960. Corporation receiving partnership assets—Presumption as to liability for debts.—Where it appears that a corporation has been organized by the members of a firm to continue the same business, and where it is shown that the assets of the firm have been transferred to the corporation, such facts afford very strong presumptive evidence that the corporation assumed the debts of the firm. Thus, where an individual was doing business under a firm name and borrowed money on the credit of both the firm and his individual name and then organized a corporation with a name practically the same as that of the firm name and transferred all his assets to such corporation, which continued the same business, it was said that the presumption was strong that the corporation assumed the debt.[54] So,

[51] Du Vivier v. Gallice, 149 Fed. 118, 80 C. C. A. 556.

[52] Baker Furniture Co. v. Hall, 76 Nebr. 88, 107 N. W. 117, 111 N. W. 129, 113 N. W. 267.

[53] Ziemer v. C. C. Bretting Mfg. Co., 147 Wis. 252, 133 N. W. 139, Ann. Cas. 1912 D, 1275n. See also Schufeldt v. Smith, 139 Mo. 367, 40 S. W. 887; Hall v. Herter, 83 Hun 19, 90 Hun 280, 157 N. Y. 694; Pratt v. Oshkosh Match Co., 89 Wis. 406, 62 N. W. 84.

[54] Bremen Sav. Bank v. Branch-Crookes Saw Co., 104 Mo. 425, 16 S. W. 209; Fort Worth Pub. Co. v. Hitson, 80 Tex. 216, 14 S. W. 843, 16 S. W. 551.

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where a partnership in failing circumstances was incorporated and its assets and business transferred to the corporation, and appropriated to its objects and purposes and the business continued by it, the corporation was held presumptively liable for the partnership debts.[55] So, where a corporation succeeded a firm, acquired all its assets, and continued its business and retained an employé of the firm under an arrangement that he should continue the services according to the prior contract, the court said that it should be inferred that the corporation assumed, under such contract, the firm debts and obligations.[56] In an action on a lease by a corporation formed from the members of the partnership executing the lease, it was said that the presumption might be indulged that an assignment of the lease had been made, where the members had treated the corporation as having acquired all the rights of the firm.[57] A person employed by a firm for a year was assured by the members that the contract would be binding on the corporation formed by them; and after the incorporation he was told by the president that his contract was "all right," and that nothing further was necessary to make it valid. After incorporation the employé's salary was reduced and he was compelled to return amounts which he had overdrawn, and he was thereafter discharged. He was held entitled to recover for a breach of contract as the corporation had adopted the agreement.[58] On the same theory a corporation is not a bona fide holder of a note transferred to it by a firm which it succeeded.[59] But no such presumption arises where the new corporation formed to succeed the partnership has stockholders other than the original partners.[60] And no conclusive presumption of

[55] Reed &c. Co. v. First Nat. Bank, 46 Nebr. 168, 64 N. W. 701.

[56] Hall v. Herter, 90 Hun (N. Y.) 280, 35 N. Y. S. 769, 70 N. Y. St. 273.

[57] Roth Tool Co. v. Champ Spring Co., 93 Mo. App. 530, 67 S. W. 967.

[58] Burke v. Lincoln-Valentine Co., 28 Misc. 202, 58 N. Y. S. 1077, 1124. See also Lafayette Sav. Bank v. St. Louis &c. Co., 2 Mo. App. 299; Broughton v. Pensacola, 93 U. S. 266, 23 L. ed. 896; Williams v. Colby, 53 Hun (N. Y.) 637, 6 N. Y. S. 459, 24 N. Y. St. 793, 3 Silv. 337; Haslett v. Wotherspoon, 1 Strobh. Eq. (S. Car.) 209.

[59] McElwee Mfg. Co. v. Trowbridge, 62 Hun (N. Y.) 471, 17 N. Y. S. 3, 43 N. Y. St. 238.

[60] Baker Furn. Co. v. Hall, 76 Nebr.

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a promise to assume or pay the debts of a firm arises by the mere fact of the purchase of its assets by a new corporation organized by the members of the old firm, even though they continue the business of the former partnership.[61] And in another case where a corporation was formed by the members of a partnership, and each member transferred all his interest in the firm property to the corporation and received therefor an aliquot part of the capital stock, and the corporation continued the business of the firm, it was held that the debts of the partnership became the debts of the corporation and it was liable therefor. And the fact that a member of the firm, for a valuable consideration, assumed and agreed to pay a debt of the firm to one of its creditors, did not constitute a novation, and did not prevent the creditor from proceeding against the corporation.[62] Where a corporation and a firm engaged in the same line of business at different places agreed that each should buy of the other at cost price such goods as it might desire, and that each should pay to the other at the end of the year a sum equal to a designated percentage of its gross profits, meaning the proceeds of its gross sales, less the first cost, import duties and carriage, this was held not sufficient to raise a presumption of partnership, and was therefore binding on the corporation.[63] Where a person carried on business in his own name and also under the name of "Branch Crookes and Co." and borrowed money under both names and afterward transferred the assets of "Branch Crookes and Co." to a corporation entitled "Branch Crookes Saw Co.," it was held there was an inference that the latter company assumed debts incurred in the name of the former.[64]

88, 107 N. W. 117, 111 N. W. 129, 113 N. W. 267; Paxton v. Bacon Mill & Min. Co., 2 Nev. 257; Durlacher v. Frazer, 8 Wyo. 58, 55 Pac. 306, 80 Am. St. 918.

[61] Campbell v. Farmers' &c. Bank, 49 Nebr. 143, 68 N. W. 344; Austin v. Tecumseh Nat. Bank, 49 Nebr. 412, 68 N. W. 628, 35 L. R. A. 444, 59 Am. St. 543n.

[62] Andres v. Morgan, 62 Ohio St. 236, 56 N. E. 875, 76 Am. St. 712.

[63] Fechteler v. Palm Bros. & Co., 133 Fed. 462, 66 C. C. A. 336.

[64] Bremen Sav. Bank v. Branch-Crookes Saw Co., 104 Mo. 425, 16 S. W. 209.

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§ 961. Statute of frauds as affecting assumption of debts.—The promise of the corporation to pay the debts of the firm to which it succeeds is a promise to pay the debts of another. It is necessarily a new contract and must proceed upon a new consideration good in law. To bind the corporation, in the absence of adoption or ratification, promises to pay would necessarily have to be in writing to be good under the statute of frauds. Thus, where a corporation succeeded a partnership it was held that a parol promise by the president of the corporation to pay a debt of the former partnership did not create a liability upon the part of the corporation.[65] Under a rule requiring that such a contract should be in writing it has been held that the vote of the directors of a corporation, duly recorded, was a sufficient memorandum in writing, and that the signature of the recording officer was a sufficient signing by the party to be charged.[66] But a promise by a corporation to pay the debts of a firm in consideration of the transfer of its assets, was held not to be a promise to pay the debt of another within the statute of frauds.[67] The promise of a corporation in such case is original, based upon the receipt of the property.[68] Whether or not the assumption of the debt is within the statute of frauds, there is authority for saying that the statute does not apply where there is a complete novation and the liability of the original debtor is extinguished.[69]

§ 962. Formation of corporation as dissolution of partnership.—As a general rule, where a partnership transfers all its

[65] Georgia Co. v. Castleberry, 43 Ga. 187. See Dingledein v. Third Ave. R. Co., 9 Bosw. (N. Y.) 79.

[66] Lamkin v. Baldwin &c. Mfg. Co., 72 Conn. 57, 43 Atl. 593, 1042, 44 L. R. A. 786. See Lane v. Brainerd, 30 Conn. 565; Chase v. Tuttle, 55 Conn. 455, 12 Atl. 874, 3 Am. St. 64n.

[67] Schufeldt v. Smith, 131 Mo. 280, 31 S. W. 1039, 29 L. R. A. 830, 52 Am. St. 628.

[68] Calumet Paper Co. v. Stotts Inv. Co., 96 Iowa 147, 64 N. W. 782, 59 Am. St. 362. See McCraith v. National Mohawk Val. Bank, 104 N. Y. 414, 10 N. E. 862; Wait v. Wait, 28 Vt. 350.

[69] Georgia Co. v. Castleberry, 43 Ga. 187. See generally Curtis v. Brown, 5 Cush. (Mass.) 488; Meriden Britannia v. Zingsen, 48 N. Y. 247, 8 Am. Rep. 549; Teeters v. Lamborn, 43 Ohio 144, 1 N. E. 513; Goodman v. Chase, 1 B. & Ald. 297.

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assets to a corporation formed to take them over, which succeeds to its rights, especially where corporate stock is issued to the partners for a portion of the assets, while other assets are to be applied to the satisfaction of firm debts, and the partnership ceases to do business as such, it will be regarded as dissolved.[70] In other cases, under somewhat differing circumstances, the courts have held that a partnership is not dissolved by a transfer of its assets to a corporation, unless there is proof of its merger therein.[71] So the mere organization of a company to take over the business of a partnership without a formal transfer of the property, does not of itself dissolve the partnership.[72] When the question of dissolution has arisen with respect to the liability of partners after organization of a corporation to take over the firm business, the decisions are also conflicting. It has been held that when, after incorporation of a firm, some of the partners obtain loans in the firm name, all the partners are liable, and the incorporation is not evidence of a dissolution of the partnership unless it is "impossible that the partnership could be continued and co-exist with the corporation for any purpose."[73] But in another case where the members of a partnership formed a corporation, transferred to it all firm assets, and took all the corporate stock themselves, it was held that the partnership was dissolved, but the corporation and the partners were bound for its debts.[74] A mining partnership is dissolved upon transfer of all its assets to a corporation.[75] And

[70] Francklyn v. Sprague, 121 U. S. 215, 30 L. ed. 936, 7 Sup. Ct. 951; Cape Sable Co.'s Case, 3 Bland Ch. (Md.) 606; Seufert v. Gille, 230 Mo. 453, 131 S. W. 102, 31 L. R. A. (N. S.) 471n; Coggswell &c. Co. v. Coggswell (N. J. Eq.), 40 Atl. 213; Hennessy v. Griggs, 1 N. Dak. 52, 44 N. W. 1010.

[71] Pearce v. Sutherland, 164 Fed. 609, 90 C. C. A. 519; Monmouth Investm. Co. v. Means, 151 Fed. 159, 80 C. C. A. 527; Whitley v. Bradley, 13 Cal. App. 720, 110 Pac. 596; Watkins v. Delahunty, 133 App. Div. 422, 117 N. Y. S. 885; Metz v. Commercial Bank, 45 S. Car. 216, 23 S. E. 13.

[72] Reuttell v. Greenwich Ins. Co., 16 N. Dak. 546, 113 N. W. 1029.

[73] First Nat. Bank v. Conway, 67 Wis. 210, 30 N. W. 215.

[74] Andres v. Morgan, 62 Ohio St. 236, 56 N. E. 875, 78 Am. St. 712.

[75] Dellapiazza v. Foley, 112 Cal. 380, 44 Pac. 727. See also Thorpe v. Pennock Merc. Co., 99 Minn. 22, 108 N. W. 940, 9 Ann. Cas. 229.

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the circumstances may show that partners who did not become members of the corporation, and firm creditors, recognized a transfer of firm assets to a corporation as a dissolution of the partnership.[76] In some cases the partners have been held liable as to creditors because no notice of dissolution was given, even though a dissolution was worked as between themselves.[77]

§ 963. Rights acquired by a corporation formed by members of a firm.—Where a corporation is formed by the members of a firm to succeed it, and the firm assets are transferred to the corporation, which assumes the liabilities of the firm, the corporation also succeeds to the rights of such firm. Thus, a corporation so acquiring the assets of a firm, was held to acquire the right of action for breach of a contract entered into with such firm.[78] So, a banking corporation succeeding a firm engaged in banking, was held to have acquired the right to enforce against the former members a guaranty of payment of bills receivable transferred by the firm to such corporation.[79] Where a corporation formed for the purpose of manufacturing and dealing in a certain line of goods, in good faith purchases from an existing partnership in a like business its plant and assets, including its outstanding claims, among them a claim for damages to the property caused by another's negligence, the corporation acquires title to such claim and may maintain an action against the party liable.[80] There seems to be no reason why the members of a firm, who incorporated for the purpose of continuing the same business, can not assign a chose in action to the firm's successor.[81] In the transfer of the firm assets to a

[76] Whitwell v. Warner, 20 Vt. 425.

[77] Overlock v. Hazzard, 12 Ariz. 142, 100 Pac. 447; Weise v. Gray's Harbor Commercial Co., 111 Ill. App. 647; Goddard v. Pratt, 16 Pick. (Mass.) 412.

[78] Lottman &c. Mfg. Co. v. Houston Waterworks Co. (Tex. Civ. App.), 38 S. W. 357.

[79] Leonhardt v. Citizens' Bank, 56 Nebr. 38, 76 N. W. 452.

[80] Central Ohio Natural Gas &c. Co. v. Capital City Dairy Co., 60 Ohio St. 96, 53 N. E. 711, 64 L. R. A. 395.

[81] Lottman &c. Mfg. Co. v. Houston Waterworks Co. (Tex. Civ. App.), 38 S. W. 357; Griffin v. Macauley, 7 Grat. (Va.) 476.

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corporation the members of the firm may agree upon the amount of stock of the new corporation that each shall receive for his share in the firm assets.[82] The members of a firm, by attempting to organize themselves into a corporation, and obtain credit on the faith of their corporate conduct, will not be heard to deny the existence of the corporation as against a creditor who gave credit after the charter was granted.[83]

§ 964. Partnership changed to corporation—Rights of beneficiaries of a deceased partner.—Where a partnership was turned into a corporation under a special statute, it was held that the beneficiaries in an estate of a deceased partner were not entitled to maintain a suit in equity for the general accounting of their interest in the assets of the firm, but that their rights must be worked out as stockholders with claims for dividends. And where the guardian of certain beneficiaries, who was also the administrator of the estate of a deceased partner, in good faith permitted the partnership business to be continued, and after an increase in the value of the property, the firm assets, by virtue of such special statute, were transferred to the corporation created to continue the business, the beneficiaries after arriving at age and receiving dividends for several years, were precluded from maintaining a bill in equity for an accounting of the partnership estate.[84] In such case the partnership property became consolidated in a unity of interest in the corporation, and the former partners became shareholders in the corporation, and their liens as partners ceased when their rights as shareholders begun.[85]

§ 965. Liability of partners after incorporation.—The mere fact that a partnership is succeeded by a corporation which receives the firm assets and assumes its liabilities, does not of itself, on the plainest principles of law, relieve the partners from

[82] Pennsylvania Tack Works v. Sowers, 2 Walker (Pa.) 416.

[83] Stewart Paper Mfg. Co. v. Rau, 92 Ga. 511, 17 S. E. 748.

[84] Hoyt v. Sprague, 103 U. S. 613, 26 L. ed. 585.

[85] Francklyn v. Sprague, 121 U. S. 215, 30 L. ed. 936, 7 Sup. Ct. 951.

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their personal liability; and the mere knowledge of a creditor of the organization of the corporation or that the partnership articles provided for incorporation, will not relieve the partners from such personal liability.[86] And partners may be personally liable for contracts made by a superintendent appointed by them in the organization of a corporation, on contracts made by him before the articles of association were signed, in the absence of the element of estoppel.[87] So, the partners may be personally liable on debts contracted by the corporation after its organization. Thus, where the corporation continues the same business in practically the same name with former customers of the partnership, without giving any notice of the incorporation, and in the absence of actual notice of the changed condition on the part of such dealers, the partners will be personally liable.[88]

[86] Witmer v. Schlatter, 2 Rawle (Pa.) 359.

[87] Wechselberg v. Flour City Nat. Bank, 64 Fed. 90, 12 C. C. A. 56, 24 U. S. App. 308, 26 L. R. A. 470; Garnett v. Richardson, 35 Ark. 144; Duke v. Taylor, 37 Fla. 64, 19 So. 172, 31 L. R. A. 484, 53 Am. St. 232; Taylor v. Branham, 35 Fla. 297, 17 So. 552, 39 L. R. A. 362, 48 Am. St. 249; Loverin v. McLaughlin, 161 Ill. 417, 44 N. E. 99; Bushnell v. Consolidated Ice Mach. Co., 138 Ill. 67, 27 N. E. 596, 1 Smith's Cas. 112; Bigelow v. Gregory, 73 Ill. 197; Pettis v. Atkins, 60 Ill. 454; Coleman v. Coleman, 78 Ind. 344; Kaiser v. Lawrence Sav. Bank, 56 Iowa 104, 8 N. W. 772, 41 Am. Rep. 85, 2 Keener's Cas. 1939; McLennan v. Hopkins, 2 Kans. App. 260, 41 Pac. 1061; Williams v. Hewitt, 47 La. Ann. 1076, 17 So. 496, 49 Am. St. 394; Vredenburg v. Behan, 33 La. Ann. 627; Chaffe v. Ludeling, 27 La. Ann. 607; Field v. Cooks, 16 La. Ann. 153; Frost v. Walker, 60 Maine 468; Whipple v. Parker, 29 Mich. 369; State v. How, 1 Mich. 512; Johnson v. Corser, 34 Minn. 355, 25 N. W. 799, 1 Smith's Cas. 100; Smith v. Warden, 86 Mo. 382; Martin v. Fewell, 79 Mo. 401, 1 Cumming's Cas. 982; Ferris v. Thaw, 72 Mo. 446; Richardson v. Pitts, 71 Mo. 128; Davidson v. Hobson, 59 Mo. App. 130; Cleaton v. Emery, 49 Mo. App. 345; Globe Pub. Co. v. State Bank, 41 Nebr. 175, 59 N. W. 683, 27 L. R. A. 854; Abbott v. Omaha Smelting &c. Co., 4 Nebr. 416; Booth v. Wonderly, 36 N. J. L. 250; Hill v. Beach, 12 N. J. Eq. 31; Guckert v. Hacke, 159 Pa. St. 303, 28 Atl. 249; Paterson v. Arnold, 45 Pa. St. 410; Haslett v. Wotherspoon, 2 Rich. Eq. (S. Car.) 395; Shields v. Clifton Hill Land Co., 94 Tenn. 123, 28 S. W. 668, 26 L. R. A. 509, 45 Am. St. 700; Slocum v. Head, 105 Wis. 431, 81 N. W. 673, 50 L. R. A. 324; Bergeron v. Hobbs, 96 Wis. 641, 71 N. W. 1056, 65 Am. St. 85.

[88] Perkins v. Rouss, 78 Miss. 343, 29 So. 92; Martin v. Fewell, 79 Mo. 401, 1 Cumming's Cas. 982; Robin-

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And where a partnership incorporated and continued to use the firm books, and continued the various running accounts without break, with the same customers, the partnership was held to be estopped to plead the incorporation as a defense against a former customer, who, without notice of the change, sold it goods and charged them to the firm.[89] Where a partnership formed a corporation and it thereafter became insolvent, they were not permitted to escape personal liability as partners.[90] Where a banking partnership became incorporated and two of the former partners, acting as president and cashier of the incorporated bank, renewed and extended the time of payment of a note transferred to it, and guaranteed by the firm, it was held that the original partners could not avail themselves of the renewal of the note as a defense in an action to hold them personally liable on the guaranty.[91] On this principle, where a partnership was incorporated under the same name, but the corporation in fact was never organized, and never actually did business as such, but the business was continued by the partnership, a sale of land by certain of the incorporators prior to the organization of the corporation, to a bona fide purchaser for value and without notice of the incorporation, was held valid as against subsequent creditors of the incorporation.[92] So, an individual or a partner may be held personally liable for goods ordered before incorporation but delivered after such individual or partner had organized the corporation.[93]

son v. First Nat. Bank, 98 Tex. 184, 82 S. W. 505; Johns v. Brown, 1 White & W. Tex. App. Civ. Cas., § 1016.

[89] Reid v. Kreling's Sons' Co., 125 Cal. 117, 57 Pac. 773. See also Goodwin v. Smith (Ky.), 66 S. W. 179, 23 Ky. L. 1810; Thorpe v. Pennock Mercantile Co., 99 Minn. 22, 108 N. W. 940; Holloway v. Brame, 83 Miss. 335, 36 So. 1; Baker Furn. Co. v. Hall, 76 Nebr. 88, 107 N. W. 117, 111 N. W. 129, 113 N. W. 267; Patton v. McDonald, 204 Pa. 517, 54 Atl. 356.

[90] Samuel &c. Wooden-Ware Co. v. Illinois &c. Mfg. Co., 51 La. Ann. 64, 24 So. 604.

[91] Leonhardt v. Citizens' Bank, 56 Nebr. 38, 76 N. W. 452.

[92] Rau v. Union Paper Mill Co., 95 Ga. 208, 22 S. E. 146.

[93] Henderson Woolen Mills v. Edwards, 84 Mo. App. 448.

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§ 966. Rights of partners among themselves after incorporation.—The rights of partners among themselves, and as against the corporation, may depend largely upon the agreement entered into at the time the partnership passes into the corporation. If by the terms of such agreement the partnership is dissolved and its affairs wound up, all rights and liabilities among themselves would be terminated, except perhaps rights and liabilities as to accounting. If each partner assists and acquiesces in the formation of the corporation, he can not then be heard to say that it was not in accordance with the agreement.[94] But if a corporation excludes a member and prevents his sharing in its management in violation either of the agreement or his rights, after having received his share of the partnership assets, he may have an action against the corporation. Thus, where a partnership organized a corporation, the partners taking the stock to the full amount of their interest in the firm, and after the incorporation a dispute arose as to the extent of the interest of one of the former partners, and thereafter the corporation declared his interest forfeited and excluded him from any share in its management, it was held in an action by him for damages that he was entitled to recover the value of his interest at the time it was taken from him, and that in computing this there should be included the technical profit and the increase in value of the assets of the corporation, with interest on the entire amount.[95] A partner in a partnership specially formed to be converted into a corporation may resort to equity to compel the partners to go forward and fulfill the agreement for the formation of the corporation.[96] Partners have no title to corporate products subsequently manufactured by the corporation successor of the partnership.[97]

[94] Hennessy v. Griggs, 1 N. Dak. 52, 44 N. W. 1010.

[95] Crosby Lumber Co. v. Smith, 51 Fed. 63, 2 C. C. A. 97.

[96] Bowker v. Torrey, 211 Mass. 282, 97 N. E. 770 (equity may be resorted to, to correct mistakes in carrying out agreement); Bannen v. Kindling, 142 Wis. 613, 126 N. W. 5.

[97] In re Miller Pure Rye Distilling Co., 214 Fed. 189.

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§ 967. Rights of creditors when partnership property is transferred to a corporation.—The individual liability of the partners is not relieved by the transfer of the firm assets to a corporation; and in the absence of consent or estoppel the rights of the creditors are not affected. Without encroaching on related subjects, it may be said in this connection that the creditors may, by bill in equity, follow the property and set aside the transfer thus made to a corporation.[98] So, creditors of an individual may set aside a transfer of his property to a corporation where the stock he received was distributed among his relatives.[99] In such case creditors may also levy an attachment or execution upon the property thus transferred.[1] Many other cases illustrate this proposition.[2] But where a creditor consented to the transfer and he thereafter received the stock as collateral security for his debt, it was held that he could not then look to the corporation for its payment, though the corporation afterwards voluntarily

[98] Strieby v. Clinton &c. Mfg. Co., 52 N. J. Eq. 576, 29 Atl. 589.

[99] Metcalf v. Arnold, 110 Ala. 180, 20 So. 301, 55 Am. St. 24; Goodale v. Wheeler, 41 Ore. 190, 68 Pac. 753.

[1] San Francisco &c. R. Co. v. Bee, 48 Cal. 398; Colorado Trading &c. Co. v. Acres Commission Co., 18 Colo. App. 253, 70 Pac. 954; Curran v. Rothschild, 14 Colo. App. 497, 60 Pac. 1111; Hinkley v. Reed, 82 Ill. App. 60; Dolan v. Wilkerson, 57 Kans. 758, 48 Pac. 23; Mulford v. Doremus, 60 N. J. Eq. 80, 45 Atl. 688; Booth v. Bunce, 33 N. Y. 139, 88 Am. Dec. 372.

[2] Fischer v. Campbell, 101 Fed. 156, 41 C. C. A. 256; Taylor v. Seiter, 199 Ill. 555, 65 N. E. 433; Croarkin v. Hutchinson, 187 Ill. 633, 58 N. E. 678; Hinkley v. Reed, 182 Ill. 440, 55 N. E. 337; Kingman v. Mowry, 182 Ill. 256, 55 N. E. 330, 74 Am. St. 169; Singer &c. Co. v. Carpenter, 125 Ill. 117, 17 N. E. 761; Shumaker v. Davidson, 116 Iowa 569, 87 N. W. 441; Collins v. Stofer, 21 Ky. L. 652, 52 S. W. 940; Folsom v. Detrick Fertilizer &c. Co., 85 Md. 52, 36 Atl. 446; Allen v. French, 180 Mass. 487, 62 N. E. 987; Scripps v. Crawford, 123 Mich. 173, 81 N. W. 1098; In re Warner, 82 Mich. 624, 47 N. W. 102; Hall v. Goodnight, 138 Mo. 576, 37 S. W. 916; Terhune v. Skinner, 45 N. J. Eq. 344, 19 Atl. 377; Mathews v. Hardt, 37 Misc. 653, 76 N. Y. S. 134; Quee Drug Co. v. Plaut, 55 App. Div. 87, 67 N. Y. S. 10; Sheffield v. Mitchell, 31 App. Div. 266, 52 N. Y. S. 925; Tradesman Nat. Bank v. Young, 15 App. Div. 109, 44 N. Y. S. 297; Buell v. Rope, 6 App. Div. 113, 39 N. Y. S. 475; Gardner v. Keogh Mfg. Co., 63 Hun 519, 18 N. Y. S. 391; National Broadway Bank v. Yuengling, 58 Hun 474, 12 N. Y. S. 762, 36 N. Y. St. 199; Williams v. Colby, 53 Hun 637,

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gave a note and mortgage to secure the same.[3] A failing debtor was held to have the right to transfer his property to a corporation organized to take over his business, and to prefer one of his creditors by an assignment of the stock received by him as collateral security.[4] Where the debts of the partnership have been assumed and the corporation becomes insolvent, there can be no preference in favor of the corporation debts over the debts of the partnership.[5]

§ 968. Transfer of partnership property to corporation made to hinder and delay creditors.—In the transfer of the assets of a partnership or of an individual to a corporation, the creditors of such partnership or individual are often hindered and delayed. And under some holdings creditors have no right to attack the transfer or reach the property, for the reason, as given, that the mere transfer of property to a corporation for capital stock therein does not hinder or delay the creditors of the transferer, the stock being subject to execution; the capital stock is regarded as a good consideration for the transfer.[6] But it appears from the adjudicated cases that such transfers are sometimes made for the clear purpose of hindering, delaying or defrauding creditors. A fraud may be committed in the transfer of a debtor's property to such a corporation as well as by a transfer to another individual for the purpose of placing it beyond the reach of creditors. Such a transaction may be closely scruti-

6 N. Y. S. 459, 24 N. Y. St. 793, 3 Silv. 337; Gross v. Daly, 5 Daly (N. Y.) 540; Bynum v. Clark, 125 N. Car. 352, 34 S. E. 438; First Nat. Bank &c. v. Trebein Co., 59 Ohio St. 316, 52 N. E. 834; Sayler v. Simpson, 45 Ohio St. 141, 12 N. E. 181; Craig v. California Vineyard Co., 30 Ore. 43, 46 Pac. 421; Sutton v. Dudley, 193 Pa. St. 194, 44 Atl. 438; Kenmore Shoe Co., Ex parte, 50 S. Car. 140, 27 S. E. 682; Bristol Bank &c. Co. v. Jonesboro Banking Trust Co., 101 Tenn. 545, 48 S. W. 228; Troy v. Morse, 22 Wash. 280, 60 Pac. 648; Haring v. Hamilton, 107 Wis. 112, 82 N. W. 698; Cass v. Sutherland, 98 Wis. 551, 74 N. W. 337; Rielle v. Reid, 28 Ont. 497; In re Carey, 39 Solicitor's Jour. 541.

[3] State v. Shapleigh Hardware Co., 147 Mo. 366, 48 S. W. 927.

[4] Gardner v. Haines, 19 S. Dak. 514, 104 N. W. 244.

[5] London v. Bynum, 136 N. Car. 411, 48 S. E. 764. But see Thorpe v. Pennock Mercantile Co., 99 Minn. 22, 108 N. W. 940.

[6] Gardner v. Haines, 19 S. Dak. 514, 104 N. W. 244.

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nized, and a court may declare its real purpose, "notwithstanding the elaborate fabrications of charters, by-laws and paper transfers." This principle was applied in a case where a merchant, heavily indebted, organized a corporation with himself, his wife and clerks as the corporators, and thereupon transferred all his property to such corporation. The evident purpose was to shield himself from the attacks of his creditors, and to enable him to carry on his business and enjoy the income. The incorporation, to the court, seemed to have been little but a paper scheme devised in his own interest.[7] The doctrine is well supported that a corporation can not be formed for the purpose of accomplishing a fraud under the disguise of the fiction; and when this is made to appear the fiction will be disregarded by the courts and the acts of the parties dealt with as though no such corporation had been formed.[8] There is not a case of a fraudulent conveyance where the members of an insolvent partnership transfers all its property to a newly created corporation in which they own all of the stock and the corporation assumes all of the debts, for the transaction in no way hinders or delays creditors of the partnership.[9] A corporation which continues the business of an insolvent partnership is not, in the absence of fraud, liable for its debts, where it is organized by the former partners, who pay for their stock by insurance money collected

[7] Kellogg v. Douglas County Bank, 58 Kans. 43, 48 Pac. 587, 62 Am. St. 596; First Nat. Bank v. Trebein Co., 59 Ohio St. 316, 52 N. E. 834.

[8] Des Moines Gas Co. v. West, 50 Iowa 16; Chicago &c. R. Co. v. Miller, 91 Mich. 166, 51 N. W. 981; Terhune v. Hackensack Sav. Bank, 45 N. J. Eq. 344, 19 Atl. 377; Booth v. Bunce, 33 N. Y. 139, 88 Am. Dec. 372; First Nat. Bank v. Trebein Co., 59 Ohio St. 316, 52 N. E. 834; Brundred v. Rice, 49 Ohio St. 640, 32 N. E. 169, 34 Am. St. 589; State v. Standard Oil Co., 49 Ohio St. 137, 30 N. E. 279, 15 L. R. A. 145, 34 Am. St. 541; Bennett v. Minott, 28 Ore. 339, 39 Pac. 997, 44 Pac. 288; Montgomery Web Co. v. Dienelt, 133 Pa. St. 585, 19 Atl. 428, 19 Am. St. 663. That courts will not uphold transfers from partnerships to corporations to defraud creditors, see Ziermer v. C. G. Bretting Mfg. Co., 147 Wis. 252, 133 N. W. 139, Ann. Cas. 1912 D, 1275n.

[9] Skinner v. Southern Grocery Co., 174 Ala. 359, 56 So. 916.

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for the destruction of the partnership assets by fire.[10] Equity will set aside transfers made by a debtor for the purpose of hindering and delaying his creditors, where he turns over all his assets to a corporation organized by himself, and becomes owner of practically all the stock, and continues the business the same as before, using the proceeds for his own benefit, notwithstanding the fact that the incorporation may be valid and the corporate stock subject to sale on execution.[11]

[10] Byrne &c. Dry Goods Co. v. Willis-Dunn Co., 23 S. Dak. 221, 121 N. W. 620, 29 L. R. A. (N. S.) 589n.

[11] Bennett v. Minott, 28 Ore. 339, 39 Pac. 997, 44 Pac. 288; First Nat. Bank v. Trebein Co., 59 Ohio St. 316, 52 N. E. 834.

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CHAPTER XXX

JOINT ADVENTURES

SECTION
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§ 975. Definition and nature.—A joint adventure may be defined as an association of two or more persons to carry out a single business enterprise for profit.[1] It is said a "venture" is an undertaking attended with risk, a business speculation.[2] And a "coadventurer" is one who takes part with others in a venture or adventure.[3] In its general nature a joint adventure is similar to a partnership,[4] and it is governed by practically the same rules of law,[5] although it is held not to be identical

[1] It has also been defined as "an enterprise undertaken by several persons jointly." Cyclopedic L. Dict. (quoted in Cyc.).

[2] McRee v. Quitman Oil Co. (Ga. App.), 84 S. E. 487.

[3] McRee v. Quitman Oil Co. (Ga. App.), 84 S. E. 487.

[4] Slater v. Clark, 68 Ill. App. 433; Doane v. Adams, 15 La. Ann. 350; Irvine v. Campbell, 121 Minn. 192, 141 N. W. 108; Ross v. Willett, 76 Hun 211, 27 N. Y. S. 785, 58 N. Y. St. 694.

[5] Goss v. Lanin (Iowa), 152 N. W. 43; Hambleton v. Rind, 84 Md. 456, 36 Atl. 597, 40 L. R. A. 216; Church v. Odell, 100 Minn. 98, 110 N. W. 346; Marston v. Gould, 69 N. Y. 220; Chester v. Dickerson, 54 N. Y. 1, 13 Am. Rep. 550; Hubbell v. Buhler, 43 Hun 82, 6 N. Y. St. 578.

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with partnership.[6] It has been held that a joint adventure is merely a partnership of limited scope and duration.[7] "A joint adventure is a limited partnership, not limited in a statutory sense as to liability, but as to its scope and duration, and under our law joint adventures and partnerships are governed by the same rules."[8] It has been said that one difference between a partnership and joint adventure is that "a dissolution for proper cause may be effected by his coadventurers against a defaulting associate without a judicial decree,"[9] but in many jurisdictions this same rule applies to partnerships.[10] It is said that the distinctions between a partnership and joint adventure are that a joint adventure relates to a single transaction, and a partnership to a general business of some particular kind,[11] that a corporation may become a party to a joint adventure, though not a partner;[12] that a party to a joint adventure may maintain an action at law to recover profits or advances, or enforce contributions or for breach of contract.[13] However, the Uniform Partnership Act, where adopted, has removed the first distinction by permitting a corporation to become a partner,[14] and one partner may sue another at law on matters connected with partnership affairs as to which an accounting is not necessary, or as to a single unadjusted item,[15] so that it seems there is no

[6] Hurley v. Walton, 63 Ill. 260; Pickerell v. Fisk, 11 La. Ann. 277; Edson v. Gates, 44 Mich. 253, 6 N. W. 645; Williams v. Gillies, 75 N. Y. 197; Wright v. Cumpsty, 41 Pa. St. 102. The first American joint adventure cases are: Hourquebie v. Girard, 2 Wash. (C. C.) 212 Fed. Cas. No. 6732, and Lyles v. Styles, 2 Wash. (C. C.) 224, Fed Cas. No. 8625.

[7] Ross v. Willett, 76 Hun 211, 27 N. Y. S. 785, 58 N. Y. St. 694; Hubbell v. Buhler, 43 Hun 82, 6 N. Y. St. 578.

[8] Ross v. Willett, 76 Hun 211, 27 N. Y. S. 785, 58 N. Y. St. 694.

[9] Saunders v. McDonough (Ala.), 67 So. 591.

[10] See ante §§ 573, 576.

[11] Camp v. United States, 15 Court Cl. (U. S.) 469; Pickerell v. Fisk, 11 La. Ann. 277; McCreery v. Green, 38 Mich. 172; Knapp v. Hanley, 108 Mo. App. 353, 83 S. W. 1005; Febbel v. Kahn, 29 App. Div. 270, 51 N. Y. S. 435.

[12] Mestier v. A. Chevalier Pavement Co., 108 La. 562, 32 So. 520.

[13] See post § 990.

[14] Uniform Partnership Act, § 745, 754.

[15] See ante § 745.

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real distinction between a joint adventure and what is termed a partnership for a single transaction.[16] Though a joint adventure is confined to one transaction, yet this may extend over a term of years.[17]

§ 976. **Agreement and consideration.**—A contract of joint adventure need not be express, it may be implied from the conduct of the parties.[18] It is not necessary that the interests and profits of the parties be definitely settled by the agreement.[19] The mutual promises of the parties are sufficient consideration for the contract,[20] and the furnishing of capital by the parties is not necessary to the validity of the contract.[21] A parol agreement may be sufficient to establish a joint adventure in the purchase and sale of real estate, and is not within the statute of frauds.[22] A written contract as to the rights of adventurers to reimbursement for purchase money supersedes all prior parol agreements.[23] Where there was an oral agreement to divide the profits realized from sale of certain real estate and thereafter a written agreement as to the profits of one particular sale was executed, the written agreement superseded the oral agreement as to the division of profits.[24] An agreement to "enter into certain contracts for municipal and government work" was held not to be limited merely to contracts for sewers and drains,

[16] See ante § 168. See also Garrison v. Bowman (Tex. Civ. App.), 183 S. W. 70.

[17] Derickson v. Whitney, 6 Gray (Mass.) 248; Field v. Woodmancy, 10 Cush. (Mass.) 427; O'Hara v. Harman, 14 App. Div. 167, 43 N. Y. S. 556; Taylor v. Bradley, 39 N. Y. 129, 1 Abb. Dec. 363, 100 Am. Dec. 415.

[18] Saunders v. McDonough (Ala.), 67 So. 591; Knapp v. Hanley, 108 Mo. App. 353, 83 S. W. 1005; Jackson v. Hooper (N. J. Ch.), 74 Atl. 130.

[19] Goss v. Lanin (Iowa), 152 N. W. 43.

[20] Alderton v. Williams, 139 Mich. 296, 102 N. W. 753; Botsford v. Van Riper, 33 Nev. 156, 110 Pac. 705; King v. Barnes, 109 N. Y. 267, 16 N. E. 332.

[21] Van Tine v. Hilands, 131 Fed. 124; Boqua v. Marshall, 88 Ark. 373, 114 S. W. 714.

[22] King v. Barnes, 109 N. Y. 267, 16 N. E. 332; Chester v. Dickerson, 54 N. Y. 1, 13 Am. Rep. 550; Felbel v. Kahn. 29 App. Div. 270, 51 N. Y. S. 435.

[23] Quinn v. Hayden, 219 Mass. 343, 106 N. E. 1002.

[24] Keilich v. Blum, 214 Pa. 54, 63 Atl. 453.

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but to include contracts for general municipal and government work.[25] It has been held that where a syndicate agreement is unambiguous it is the only evidence of the relations which the parties sustained to each other, and where a subscriber to such agreement sues the managers on a contract which he alleges they made with him under authority conferred by the agreement, it must be determined from the agreement itself whether they were partners.[26] The defendant in a joint contract for manufacturing and selling lumber, where the contract provided for payment from the proceeds of the actual cost of planing, loading and selling, was not permitted to charge either the reasonable value or the customary charge for such service.[27]

§ 977. **Particular cases.**—It has been held in the following cases that the relation of joint adventurers existed; where claimants in bankruptcy agreed on joint account to purchase certain bonds and stock of a corporation;[28] where an insurance solicitor received money to buy stock in his company to sell at a profit and promised to divide the profit;[29] an agreement between two parties as to the purchase, sale and disposition of goods on a joint account;[30] an agreement to form a corporation to acquire lands held under an option;[31] where parties made an agreement to procure an option to further develop and operate a mine;[32] where two attorneys were to prosecute together claims on a contingent fee and share equally in expenses and profits and if one should die before the litigation was finished the other was to complete it for their joint benefit;[33] where the owner of a play called "Neptune's Brides" and a patented air reservoir which

[25] Stitzer v. Fonder, 214 Pa. 117, 63 Atl. 421.

[26] Jones v. Gould, 123 App. Div. 236, 108 N. Y. S. 31.

[27] Wisconsin Sulphite Fibre Co. v. D. K. Jeffris Lumber Co., 132 Wis. 1, 111 N. W. 237.

[28] In re Kessler, 174 Fed. 906.

[29] Mueller v. Smith, 173 Ill. App. 45.

[30] Lobsitz v. E. Lissberger Co., 154 N. Y. S. 556.

[31] Saunders v. McDonough (Ala.), 67 So. 591.

[32] Kent v. Costin, 130 Minn. 450, 153 N. W. 874.

[33] Hill v. Curtis, 154 App. Div. 662, 139 N. Y. S. 428.

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made the play possible contracted to divide with two other parties the receipts, expenses and profits in connection with their development and use.[34] Where certain persons who had secured a right to sell real estate, induced another to advance the price and take title in his name by guaranteeing the repayment of the money advanced, with interest, the profits on resale to be divided, the transaction was held to be a joint adventure.[35] In one case where several persons had agreed, during a specified time, to purchase, develop and sell real estate, title to which was to be held by some of them as trustees, and it was subsequently agreed that one of the trustees should have active charge of the management and development of the property and of making sales thereof, and such trustee thereafter secured money from the parties to the agreement, proceeded with the development of the property, and from time to time made sales thereof, receiving the proceeds therefrom. It was held a joint adventure as between the parties to the agreement, and that after the expiration of the term the court should direct a general accounting of all transactions between the parties.[36] Although one party to a joint adventure in which he and the plaintiff leased a theater for a term of years and divided profits, in order to operate the theater organized a corporation in which he and his employés held all the stock and received all the dividends, and the plaintiff was not a stockholder in the organization, it was held they remained joint adventurers.[37] An agreement to procure an option to develop a mine and to form a corporation and issue stock to be divided among the parties was held a joint adventure or partnership.[38] It was held that where three persons entered into a contract under which two of them in consideration of a stated amount paid, granted to the third the privilege of purchasing all the coal rights in certain localities

[34] Voegtlin v. Bowdoin, 54 Misc. 254, 104 N. Y. S. 394.

[35] Irvine v. Campbell, 121 Minn. 192, 141 N. W. 108.

[36] Berg v. Gillender, 115 App. Div. 288, 100 N. Y. S. 792.

[37] Brady v. Erlanger, 149 N. Y. S. 929.

[38] Kent v. Costin, 130 Minn. 450, 153 N. W. 874.

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named for a price stated, such privilege of purchase to be in force as long as the original options were in force, or as long as they might thereafter be extended, and providing that in case of sale under the agreement the profits arising therefrom should be divided equally between the three parties to the agreement, that in case of a sale at a figure above the amount named in the contract the two parties selling the privilege were not to share in any of the profits over and above the price stated; and that the profits should be determined by the difference between the price in each of the original options executed by the owners of the land and the sale price, a joint adventure and community of interest was established and that the rights and interests of the parties concerned are so complex as to require the intervention of equity.[39] A pooling agreement where the owners provide for the sale of the property and for a ratable division of profits has been held to be a joint adventure.[40] A contract entered into by a real estate agent and a landowner to the effect that, if the agent would find a purchaser for certain land, he should have as compensation the amount it should sell for above a certain price, is a contract of agency and not of joint adventure.[41] In order to authorize a recovery by plaintiff of a share of the profits under a speculation made by defendants, he must not only show that he was interested in the deal, but what interest he had, and this is not done by showing previous deals in which he was interested; his interest in each of them being different, and he must show a contract between him and defendants; it is not enough that he was interested in a fund which the defendants used in the transaction without his authority.[42] A bank which merely financed a cotton purchase by a broker was not a joint adventurer with him.[43] If contributors to a fund do

[39] Edwards v. Hudson, 165 Ill. App. 521.

[40] Green v. Higham, 161 Mo. 333, 61 S. W. 798; Spier v. Hyde, 92 App. Div. 467, 87 N. Y. S. 285.

[41] Manker v. Tough, 79 Kans. 46, 98 Pac. 792.

[42] Whitman v. Bartlett (Ala.), 46 So. 972.

[43] McLean v. City State Bank of Mangum, Okla., 210 Fed. 21, 126 C. C. A. 601.

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not render services and take no part in the performance of the contract for which they have contributed, though they share in the profits, they are not joint adventurers.[44] Where, in a contract for the production of a certain publication the plaintiff was to do the writing, etc., and the publishing company the mechanical work, etc., "the cash profits to be divided one-third to you (plaintiff) and two-thirds to us." and "your connection to be one of profit-sharing," etc., it was held that the interest of the plaintiff was that of a profit-sharer and not a joint owner.[45]

§ 978. **Good faith.**—Joint adventurers, like any partners, stand in a mutual relationship of trust and confidence, and must act fairly with each other and observe the utmost good faith in their dealings.[46] "The law is well established that the relation between joint adventurers is fiduciary in its character, and the utmost good faith is required of the trustee to whom the deal or property may be intrusted, and that such trustee will be held strictly to account to his co-adventurers, and that he will not be permitted by reason of the possession of the property or profits, whichever the case may be, to enjoy an unfair advantage, or have any greater rights in the property by reason of the fact

[44] Pierce v. McDonald, 153 N. Y. S. 810.

[45] Bryan v. Thompson Pub. Co., 258 Mo. 187, 167 S. W. 440.

[46] Lyles v. Styles, 2 Wash. (U. S.) 224, Fed. Cas. No. 8625; Delmonico v. Roudebush, 5 Fed. 165, 2 McCrary 18; Saunders v. McDonough (Ala.), 67 So. 591; Boqua v. Marshall, 88 Ark. 373, 114 S. W. 714; Cole v. Bacon, 63 Cal. 571; King v. Wise, 43 Cal. 628; Humburg v. Lotz 4 Cal. App. 438, 88 Pac. 510; Starkweather v. Jenner, 27 App. D. C. 348; Calkins v. Worth, 215 Ill. 78, 74 N. E. 81; Maxwell v. McWilliams, 145 Ill. App. 155; Goss v. Lanin (Iowa), 152 N. W. 43; Hambleton v. Rhind, 84 Md. 456, 36 Atl. 597, 40 L. R. A. 216; Runkle v. Burrage, 202 Mass. 89, 88 N. E. 573; Field v. Woodmancy, 10 Cush. (Mass.) 427; Gasser v. Wall, 111 Minn. 6, 126 N. W. 284; Church v. Odell, 100 Minn. 98, 110 N. W. 346; Seehorn v. Hall, 130 Mo. 257, 32 S. W. 643, 51 Am. St. 562; Jackson v. Hooper, 76 N. J. Eq. 185, 74 Atl. 130; Selwyn v. Waller, 142 N. Y. S. 1051; Getty v. Devlin. 54 N. Y. 403; Niles v. Lee (S. Dak.), 140 N. W. 259; Bond v. Taylor, 68 W. Va. 317, 69 S. E. 1000; Berry v. Colborn, 65 W. Va. 493, 64 S. E. 636, 17 Ann. Cas. 1018; Knudson v. George, 157 Wis. 520, 147 N. W. 1003; Jones v. Kinney, 146 Wis. 130, 131 N. W. 339, Ann. Cas. 1912 C, 200.

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that he is in possession of the property or profits as trustee than his co-adventurers are entitled to. The mere fact that he is intrusted with the rights of his co-adventurers imposes upon him the sacred duty of guarding their rights equally with his own, and he is required to account strictly to his co-adventurers, and, if he is recreant to his trust, any rights they may be denied are recoverable."[47] "Where several persons by common agreement join as buyers of property, each to acquire a fractional undivided interest therein proportionate to the amount paid in by him, they owe to one another in such enterprise the duty of good faith and full and fair disclosure, and neither one can by secret commission or rebate obtain any advantage over his co-adventurers. The consent of each obtained upon the understanding and belief that the funds, interest and aid of each is and will be given to the enterprise within the bounds agreed upon. For one by secret treaty with the seller to obtain a commission or rebate is a fraud upon his fellow buyers."[48] Thus, where parties jointly leased a theater under an agreement to divide profits, and the business was left under the control of one of them, he was bound to act for the benefit of both.[49] If one co-adventurer without the other's knowledge consummates a deal for the purchase of land which they had bargained for, to part of which the vendor's title is found to be faulty, whereby such one receives a profit in consideration of carrying out the purchase of the portion to which a good title was furnished, this is contrary to the policy of the law.[50] Persons who receive confidential information with a view to secure their participation in joint adventure are held to be disqualified to acquire interests antagonistic to the person from whom they received such information.[51] A physician who took title to property in his own name on an agreement that he and the patient would each put

[47] Botsford v. Van Riper, 33 Nev. 156, 110 Pac. 705.

[48] Jones v. Kinney, 146 Wis. 130, 131 N. W. 339, Ann. Cas. 1912 C, 200.

[49] Brady v. Erlanger, 149 N. Y. S. 929.

[50] Curry v. La Fon, 133 Mo. App. 163, 113 S. W. 246.

[51] Goss v. Lanin (Iowa), 152 N. W. 43.

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in half the price, was compelled to convey an undivided one-half to the patient, where he mortgaged the property for his part of the price.[52] Where one who was to receive a commission for the sale of lands induced others to join with him in its purchase, each to share proportionately in profits, they are entitled to share in his commission.[53] One who accepted an offer to buy mining property on which he had an option on the purchaser's agreement to pay him a share of profits on resale, is bound to disclose to them the actual option price.[54] Those who aid one adventurer to procure an advantage over the others may in equity be equally liable with him.[55] One who accepts a consideration for his share in a joint adventure is bound, in the absence of fraud, duress or mistake.[56] An appropriation of common property to individual use may either constitute a conversion or create the relation of debtor and creditor.[57] A party to a joint adventure is bound to use due diligence in carrying out an undertaking, but does not guarantee success.[58] As in the case of one rendering services, a joint adventurer contracts for good faith and integrity, but not for inerrancy, and is liable for negligence, fraud or dishonesty, but not for nonnegligent mistakes, though, if he contracts for a particular or extraordinary degree of skill or expertness, a higher than ordinary degree of diligence and skill will be required of him.[59] Where a plaintiff sued to recover one-half of a $3,000 advantage obtained by defendant over him by concealment in the purchase of property used in a joint enterprise, the fact that plaintiff and defendant

[52] McNiel v. Holmes (Ore.), 150 Pac. 255.

[53] Church v. Odell, 100 Minn. 98. 110 N. W. 346; Seehorn v. Hall, 130 Mo. 257, 32 S. W. 643, 51 Am. St. 562; Getty v. Devlin, 54 N. Y. 403; Sheldon v. Wood, 2 Bosw. (N. Y.) 267.

[54] Rich v. Teasley, 194 Fed. 534; McCutcheon v. Smith, 173 Pa. St. 101, 33 Atl. 881.

[55] Hambleton v. Rhind, 84 Md. 456, 36 Atl. 597, 40 L. R. A. 216.

[56] Oteri v. Oteri, 38 La. Ann. 403.

[57] Hourquebie v. Girard, 2 Wash. (C. C.) 212, Fed. Cas. No. 6732; Beckwith v. Talbot, 2 Colo. 639; Morris v. Wood (Tenn. Ch.), 35 S. W. 1013.

[58] Sicklesteel v. Edmonds, 158 Wis. 122, 147 N. W. 1024.

[59] Knudson v. George, 157 Wis. 520, 147 N. W. 1003.

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had formed a corporation to conduct the enterprise after the purchase of the property, and that plaintiff sold his shares at a profit did not affect his right of recovery for the concealment.[60] Where real estate is purchased jointly it is implied that each is engaged in the enterprise solely for the mutual benefit and common advantage of all, and that each has a common interest according to the amount of his subscription.[61] Where there was a contract to purchase land on execution sale, which permitted one party to bid on his own account as long as any other bidder than plaintiff should make a bid, he was entitled to bid for himself when third persons bid and the other party failed to bid.[62]

§ 979. **Property involved.**—If title is taken in the name of one party to property purchased with funds contributed for the joint adventure, he holds it as trustee for the other adventurers,[63] and property bought with the proceeds of a joint adventure belongs to all the adventurers as joint property.[64] But where one party advances all the money for purchasing the property and the others are to contribute services for a share in the profits, the title to the property is in the one who furnishes the money.[65] It has been held that parties to a joint adventure have the power and interest of a partner as to the disposition of property.[66] The power to bind the others by disposing of the property may be given to a majority.[67] A sale of the property made in good faith by the party having power to sell binds all the parties.[68]

[60] Humburg v. Lotz, 4 Cal. App. 438, 88 Pac. 510.

[61] Lomita Land & Water Co. v. Robinson, 154 Cal. 36, 97 Pac. 10, 18 L. R. A. (N. S.) 1106.

[62] Gloeckner v. Kittlaus, 192 Mo. 477, 91 S. W. 126.

[63] Irvine v. Campbell, 121 Minn. 192, 141 N. W. 108; Botsford v. Van Riper, 33 Nev. 156, 110 Pac. 705; Freschel v. Bellesheim, 47 Hun 636, 14 N. Y. St. 610.

[64] Hayden v. Eagleson, 47 Hun 639, 15 N. Y. St. 200.

[65] Keller v. Fitzgerrell, 158 Ill. App. 534; Scudder v. Budd, 52 N. J. Eq. 320, 26 Atl. 904; Ross v. Willett, 76 Hun 211, 27 N. Y. S. 785, 58 N. Y. St. 694; Moore v. Huntington, 7 Hun (N. Y.) 425; Bowman v. Saigling (Tex. Civ. App.), 111 S. W. 1082; Smith v. Watson, 2 B. & C. 401, 9 E. C. L. 180.

[66] Lyles v. Styles, 2 Wash. (U. S.) 224, Fed. Cas. No. 8625.

[67] Morey v. Clopton, 103 Mo. App. 368, 77 S. W. 467.

[68] Marston v. Gould, 69 N. Y. 220.

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§ 980. Power to bind co-adventurer.—The power of a joint adventurer to bind his co-adventurer is more restricted than that of a partner in a general mercantile business, and it is held that an adventurer is not bound by the act of his co-adventurer in creating indebtedness in conducting a joint publishing venture.[69] A third person, the inventor and patentee of a gas engine and his financial backer, who licensed plaintiff to manufacture such engines, and agreed to reimburse him for the building of an experimental engine in case of failure, were held joint adventurers, and an agreement by one to extend the time to build the engine was binding on the other.[70] Officers and managers of a syndicate who issued a prospectus in relation to a holding corporation, or who adopted and recognized the prospectus, are liable for any fraud or misrepresentation contained in it, even though innocent of personal wrongdoing.[71] All of the managers of a syndicate who intrusted the management of certain property to one of their number, are equally liable for his acts.[72] Where a joint adventurer purported to act solely for himself in his dealings with a third person and the dealings were outside of the scope of the joint business, the other adventurer was not liable for the wrongful acts of such person in such dealings.[73] The courts will not impose on the parties to the contract a duty or obligation not naturally inferable from its terms.[74] Where an owner of one-third of a paper as an investment had no knowledge of contracts and debts incurred by the two other owners who managed the business, and had never had an agreement with them, it was held he could not be held jointly liable with them.[75] In one case where parties were held not to be partners because no mutual agency existed, the court held them to be joint

[69] Strohschein v. Kranich, 157 Mich. 335, 122 N. W. 178.

[70] Anderson v. Weber, 148 N. Y. S. 133.

[71] Lane v. Fenn, 65 Misc. 336, 120 N. Y. S. 237.

[72] Jones v. Gould, 209 N. Y. 419, 103 N. E. 720.

[73] Lawrence v. Streeter, 130 Minn. 64, 153 N. W. 126.

[74] Hawkes v. Taylor, 175 Ill. 34, 51 N. E. 611.

[75] Strohschein v. Kranich, 157 Mich. 335, 122 N. W. 178, 16 Detroit Leg. N. 385.

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adventurers, and stated as a distinction between partnership and joint adventure that there is no mutual agency in the latter relation, but this case goes farther than most decisions.[76] Circumstances may be shown to discover whether a party engaged with another in a joint enterprise did apparently authorize him to pledge property of the joint enterprise to secure an individual debt.[77] The managers of a syndicate who are not partners are not personally bound by the independent agreement of one of them.[78] Where a contract provided that one party was to furnish land, farming implements and stock and the other to employ laborers and superintend the work necessary in producing the crop, and disposing of it on the market at such time as might be fixed by the mutual consent of the associates, it was held neither could withhold his consent arbitrarily to a sale after the expiration of a reasonable time after the product was ready for the market, and such refusal to consent after the making of the demand, would entitle the other to damages as of the time of refusal, and constitute a breach of contract.[79] In a contract for the construction of a dredge to be used in performing a contract, a party interested in the latter authorized his joint adventurers to borrow money to build the dredge and mortgage it for that purpose, and this authority constituted a power coupled with interest which could not be revoked.[80]

§ 981. **Abandonment of the adventure.**—If the purposes of the adventure have not been accomplished, none of the parties has a right to abandon the adventure unless his copartners consent, and one who does so is liable in damages for the consequences of his act.[81] It seems that the measure of the recovery

[76] Jackson v. Hooper, 76 N. J. Eq. 185, 74 Atl. 130.

[77] Smith v. First Nat. Bank of Albany, 151 App. Div. 317, 135 N. Y. S. 985.

[78] Jones v. Gould, 123 App. Div. 236, 108 N. Y. S. 31.

[79] Baker v. Keever, 130 Ga. 257, 60 S. E. 551.

[80] The Seattle, 170 Fed. 284, 95 C. C. A. 480.

[81] Saunders v. McDonough (Ala.), 67 So. 591; Alderton v. Williams, 139 Mich. 296, 102 N. W. 753; McCreery v. Green, 38 Mich. 172; Streat v. Wolf, 135 App. Div. 81, 119 N. Y. S. 779; Taylor v. Bradley, 39 N. Y. 129, 1 Abb. App. Dec. 363, 100

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of a party suing for such damages is "the extent of what he would have gained if he had been permitted to complete the contract, providing, however, such damages would be proximate and a natural consequence of defendant's breach and made to appear by reasonably certain data."[82] Upon one party's abandonment of the venture it is the duty of the other parties to use reasonable diligence to minimize the damages so caused.[83] It has been held that an adventure as to which there is no time limit, may be terminated on notice,[84] although it can not be terminated as to a member, even for a valid reason, without notice.[85] And it may be dissolved if cause exists sufficient for a decree of dissolution of a partnership.[86] A party is not bound to go on with an adventure, nor liable in damages for refusal, where its continuation will only entail further loss.[87] Nor is a party liable in damages who refuses to go ahead after another party has abandoned the adventure.[88] Where two parties jointly obtained an option for the purchase of land and agreed to pay installments of the price on certain dates, it was held that one of the joint purchasers was under no obligation to pay an installment either for his own benefit, or that of the other purchaser, and that on failure to pay, either of the purchasers was at liberty to make a new contract of purchase excluding the other from its benefits.[89] So, a subscriber to a fund for the purchase of land, who had also agreed to loan a part of the money needed to complete the purchase, has the right to withdraw from such

Am. Dec. 415; Chambers v. Mittnacht, 23 S. Dak. 449, 122 N. W. 434; Clarkson v. Whitaker, 12 Tex. Civ. App. 483, 33 S. W. 1032; Davidor v. Bradford, 129 Wis. 524, 109 N. W. 576. See also Jacobson v. McCullough, 113 Minn. 332, 129 N. W. 759. (Where the venture was the promotion of a corporation.)

[82] McCreery v. Green, 38 Mich. 172.

[83] Davidor v Bradford, 129 Wis. 524, 109 N. W. 576.

[84] Edwards v. Johnson, 90 S. Car. 90, 72 S. E. 638; Annaud v. Tupper, 21 N. Scotia 11, 16 Can. Sup. Ct. 718; Allan v. McHeffey, 5 Nova Scotia 120.

[85] Saunders v. McDonough (Ala.), 67 So. 591.

[86] Hubbell v. Buhler, 43 Hun 82, 6 N. Y. St. 578.

[87] Hart v. McDonald, 52 La. Ann. 1686, 28 So. 169.

[88] Field v. Woodmancy, 10 Cush. (Mass.) 427.

[89] Commercial Bank v. Weldon, 148 Cal. 601, 84 Pac. 171.

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agreement where the other subscribers failed to raise the balance of the money needed to make the payment.[90] After abandonment of a joint adventure by some of the parties, the others who go ahead with it are not bound to account for profits to those abandoning it.[91] And if one party refuses to advance funds he has abandoned the adventure and can not hold the others to account for profits which they afterwards made from it.[92] There may be a termination of a joint adventure by consent of the adventurers, after which there is no liability to share losses.[93] Though one party to an adventure may abandon it for himself, he can not abandon it for others.[94]

§ 982. Right to profits.—All the profits arising from a joint adventure belong to all the parties, and one party has no right to retain secret profits.[95] Thus where a prospector sent to locate mining claims under a joint agreement, after the termination of a joint agreement, secured mining claims from persons whom he met while the agreement was in effect, the other parties to the adventure were entitled to a share in the profits.[96] If there is no agreement otherwise, profits are to be divided equally between the parties to the adventure,[97] even though they

[90] Sicklesteel v. Edwards, 158 Wis. 122, 147 N. W. 1024.

[91] Commercial Bank v. Weldon, 148 Cal. 601, 84 Pac. 171; Goodell v. Smith. 9 Cush. (Mass.) 592; Prosser v. Manley, 122 Minn. 448, 142 N. W. 876; Scott v. Clark, 1 Ohio St. 382.

[92] Yerger's Appeal, 100 Pa. St. 88.

[93] Shaw v. Gandolfo, 9 La. Ann. 32.

[94] Goss v. Lanin (Iowa), 152 N. W. 43.

[95] Wann v. Kelley, 5 Fed. 584, 2 McCrary (U. S.) 628; King v. Wise, 43 Cal. 628; Rever v. Blaisdell (Colo. App.), 143 Pac. 385; Yale Gas Stove Co. v. Wilcox, 64 Conn. 101, 29 Atl. 303, 25 L. R. A. 90, 42 Am. St. 159; Maxwell v. McWilliams, 145 Ill. App. 155; Jordan v. Markham, 130 Iowa 546, 107 N. W. 613; Hambleton v. Rhind, 84 Md. 456, 36 Atl. 597, 40 L. R. A. 216; Petrie v. Torrent, 100 Mich. 117, 58 N. W. 690, 59 N. W. 941; Church v. Odell, 100 Minn. 98, 110 N. W. 346; Seehorn v. Hall, 130 Mo. 257, 32 S. W. 643, 51 Am. St. 562; Lind v. Webber, 36 Nev. 623, 134 Pac. 461; Dunlop v. Richards, 2 E. D. Smith (N. Y.) 181; Selwyn v. Waller, 142 N. Y. S. 1051; Berry v. Colborn, 65 W. Va. 493, 64 S. E. 636; Russell v. Austwick, 1 Sim. 52, 27 Rev. Rep. 157; Allan v. McHeffey, 5 Nova Scotia 120.

[96] Lind v. Webber, 36 Nev. 623, 134 Pac. 461.

[97] Van Tine v. Hilands, 131 Fed. 124; Wetmore v. Crouch, 150 Mo.

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did not contribute to the capital equally.[98] The proportion in which profits are shared is often fixed by contract.[99] A right to one-third of the profits is not a right to share in one-third of gross amounts received.[1] It was held that where producers of a play under their contract were to produce it not as partners, but merely to share profits and losses, one might assign a portion of his interest in profits to a third person.[2] In a case where some of the parties to a joint agreement failed to contribute temporary advances for the development of the property, where no demand for contribution was ever made, and the proceeds were sufficient to repay advances, it was held that they did not forfeit their right to share in the profits.[3] But where a plaintiff failed to pay his proportionate share to the estate of a deceased associate in a joint adventure to purchase land, it was held that he was not entitled to demand his percentage in the land so purchased.[4] So, generally, an adventurer who fails to pay his share of expense is precluded from sharing in proceeds.[5] In a joint adventure profits means the net amount after all proper expenses incident to the business have been deducted.[6] The term "net profits" means the entire gain in a venture after the deduction from the net value of all assets on hand, the capital invested and all outstanding liabilities.[7] They are not limited to money, but may consist

671, 51 S. W. 738; Knapp v. Hanley, 108 Mo. App. 353, 83 S. W. 1005; Furman v. McMillian, 2 Lea (Tenn.) 121.

[98] Withers v. Pemberton, 3 Coldw. (Tenn.) 56; Rankin v. Black. 1 Head (Tenn.) 650; Gee v. Gee, 2 Sneed (Tenn.) 395.

[99] Thurston v. Hamblin, 199 Mass. 151, 85 N. E. 82.

[1] Simmons v. Lima Oil Co., 71 N. J. Eq. 174, 63 Atl. 258.

[2] Selwyn v. Walter, 160 App. Div. 725, 146 N. Y. S. 7.

[3] Lind v. Webber, 36 Nev. 623, 134 Pac. 461.

[4] Hedges v. Mountjoy, 149 N. Y. S. 869.

[5] Saunders v. McDonough (Ala.), 67 So. 591. See also Miller v. Butterfield, 79 Cal. 62, 21 Pac. 543; Goodell v. Smith, 9 Cush. (Mass.) 592; Scott v. Clark, 1 Ohio St. 382.

[6] Doane v. Adams, 15 La. Ann. 350; Richardson v Dickinson, 26 N. H. 217; Scott v. Clark, 1 Ohio St. 382; Jones v. Davidson, 2 Sneed (Tenn.) 447; Chilberg v. Jones, 3 Wash. 530, 28 Pac. 1104.

[7] Thurston v. Hamblin, 199 Mass. 151, 85 N. E. 82.

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of a portion of the unsold property which was the subject of the adventure,[8] and they are presumably determined according to the ordinary rules of business.[9] In a pooling agreement in which it was provided that the parties share in the profits or earnings of the pooled property, neither party can claim a share of the earnings of the property which he contributed, but only out of the earnings of the aggregate property, of which he can claim a distributive share.[10]

§ 983. Sharing of losses.—As a general rule all the parties to a contract of joint adventure must share in its risks.[11] The same rule applies to sharing losses as to sharing profits, that in the absence of agreement the parties must share equally therein,[12] even where contributions are unequal,[13] though it has been held that where one party is to furnish the capital and the other services, the latter is not liable for any part of the losses.[14] So a party who has in good faith paid losses or expenses is entitled to recover from the others their pro rata share.[15] It has been held that if the venture is in the purchase and sale of land,[16] or goods,[17] there is no liability for loss until the sale has been made. Losses caused wholly by the negligence or misconduct of one party must be borne by him.[18] Where one party assumed

[8] Jones v. Davis, 48 N. J. Eq. 493, 21 Atl. 1035; Scott v. Clark, 1 Ohio St. 382.

[9] Chilberg v. Jones, 3 Wash. 530, 28 Pac. 1104.

[10] Kennebec &c. R. Co. v. White, 38 Maine 63.

[11] Hourquebie v. Girard, 2 Wash. (C. C.) 212, Fed. Cas. No. 6732.

[12] Hart v. McDonald, 52 La. Ann. 1686, 28 So. 169; Tuyes v. Avegno, 23 La. Ann. 177; Claflin v. Godfrey, 21 Pick. (Mass.) 1; L'Engle v. Smith, 48 Mo. 276; Timberlake v. Hughes, 65 Mo. App. 640; Floyd v. Efron, 66 Tex. 221, 18 S. W. 497; Saunders v. McDonough (Ala.), 67 So. 591.

[13] Gee v. Gee, 2 Sneed (Tenn.), 395; Withers v. Pemberton, 3 Coldw. (Tenn.) 56; Rankin v. Black, 1 Head (Tenn.) 650.

[14] Rau v. Boyle, 5 Bush (Ky.) 253.

[15] Lyles v. Styles, 2 Wash. (C. C.) 224, Fed. Cas. No. 8625; Runkle v. Burrage, 202 Mass. 89, 88 N. E. 573; Northrup v. Colter, 150 Mo. App. 639, 131 S. W. 364; McMillan v. Whitley (Utah), 113 Pac. 1026.

[16] Roehl v. Porteous, 51 La. Ann. 1746, 26 So. 440.

[17] Jones v. McNally, 53 Misc. 59, 103 N. Y. S. 1011.

[18] Hourquebie v. Girard, 2 Wash. (C. C.) 212; Fed. Cas. No. 6732; Sullivan v. Ross, 124 Mich. 287, 82 N.

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the risks of the transaction and would have reaped the profits thereof and the other party held merely for security the legal title to a shipment of coffee which was the subject of the venture, and his interest in the venture was confined to a reimbursement of his advances, the first party should bear the loss.[19]

§ 984. **Contribution.**—Where all parties are to contribute equally to capital and expenses, one who has advanced more than his share may compel the others to reimburse him as for money paid for their use.[20] It has even been held that on the refusal of a party to continue in a plan for the management of the business, he is not relieved of his obligation to contribute.[21] If one party is insolvent or unable to pay his share the other parties to a contract of joint adventure who are able to pay must contribute equally to the share of such party.[22] Under an agreement whereby plaintiff and defendants were to purchase land jointly upon equal terms, for their mutual benefit, it was held that defendants must account to plaintiff for money which they received in excess of his proportionate part of the purchase price.[23] Where one party loses his share of profits through an employé's dishonesty, but on account of his own negligence, the other party is not bound to contribute to the loss.[24] One party can not recover from another on a loss until it has been actually incurred or it is reasonably certain that it will take place.[25] If, after the settlement and dissolution of a joint adventure, one party who has purchased its uncollected assets from his associates suffers loss thereon, he can not recover from the other parties any

W. 1071. See Hesketh v. Blanchard, 4 East 143.

[19] Irby v. Cage, Drew & Co., 46 So. 670, 121 La. 615.

[20] Buckmaster v. Grundy, 8 Ill. 626; Tuyes v. Avegno, 23 La. Ann. 177; Doane v. Adams, 15 La. Ann. 350; Pillsbury v. Pillsbury, 20 N. H. 90; Stover v. Flack, 30 N. Y. 64; Finlay v. Stewart, 56 Pa. St. 183; Brady v. Colhoun, 1 Penr. & W. (Pa.) 140.

[21] Pillsbury v. Pillsbury, 20 N. H. 90.

[22] Kimball v. Williams, 51 App. Div. 616, 65 N. Y. S. 69; Lowe v. Dixon, 16 Q. B. D. 455.

[23] McMullen v. Harris, 165 Iowa 703, 147 N. W. 164.

[24] Archibald v. De Lisle, 25 Can. Sup. Ct. 1.

[25] Stoddard v. Murdock, 37 Mo. 580.

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portion of his loss.[26] It has also been held that a party agreeing to render services in connection with the sale of a property may be released from a share in liability for loss if the place of sale as specified in the contract is changed, even though he has consented to such a change.[27] The party entitled to contribution for losses may recover interest from the date of payment,[28] or from the time notice of the loss is received by the other party.[29] After a project has failed the subscribers are not entitled to contribution for disbursements for traveling or other expenses.[30] No suit can be brought by either party on a single item in such a case, but all losses must be adjusted by accounting and upon the one claiming a balance due rests the burden of proof.[31] If a party to an adventure abandons it for just cause, all must share equally any losses sustained up to that time.[32] In absence of agreement it is presumed that parties are to contribute equally.[33]

§ 985. Settlement—Expenses.—Upon settling accounts at the termination of the adventure the amounts originally advanced by each party must be repaid and the expenses incurred in the adventure cared for before the profits can be ascertained and divided.[34] A party should be reimbursed for expenses legitimately incurred,[35] but not for a mere gratuitous payment to a third person,[36] nor the cost of reconstructing manufactured ar-

[26] Halstead v. Schmelzel, 17 Johns. (N. Y.) 80.

[27] Shaw v. Gandolfo, 9 La. Ann. 32.

[28] Floyd v. Efron, 66 Tex. 221, 18 S. W. 497.

[29] Kane v. Smith, 12 Johns. (N. Y.) 156.

[30] Sicklesteel v. Edmonds, 158 Wis. 122, 147 N. W. 1024.

[31] Hart v. McDonald, 52 La. Ann 1686, 28 So. 169.

[32] Hart v. McDonald. 52 La. Ann. 1686, 28 So. 169.

[33] Saunders v. McDonough (Ala.), 67 So. 591.

[34] Boqua v. Marshall, 88 Ark. 373, 114 S. W. 714; Doane v. Adams, 15 La. Ann. 350; Thurston v. Hamblin, 199 Mass. 151, 85 N. E. 82; Edson v. Gates, 44 Mich. 253, 6 N. W. 645; King v. Barnes, 109 N. Y. 267, 16 N. E. 332; Gordon v. Boppe, 55 N. Y. 665; Withers v. Pemberton, 3 Coldw. (Tenn.) 56; Furman v. McMillian, 2 Lea (Tenn.) 121; Wisconsin Sulphite Fibre Co. v. D. K. Jeffris Lumber Co., 132 Wis. 1, 111 N. W. 237.

[35] Funk v. Miller (Tex. Civ. App.), 142 S. W. 24.

[36] Molloy v. Rourke, 83 Conn. 196, 76 Atl. 517.

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ticles, caused by the negligence of a party who was to manufacture them.[37] But a party is not entitled to be repaid expenses when this would mean that he contributed nothing to the enterprise, for certain expenses may be a part of that which a party is to furnish to the enterprise, the rule as to expenses not being exactly the same as the rule in ordinary partnerships.[38] Expenses which one party incurs in carrying out his portion of the agreement can not be charged against the others.[39] A party who is to advance funds can not charge expenses which he paid in obtaining them.[40] Allowance can not be made for expenses not actually incurred in prosecuting the business of the adventure.[41] There can ordinarily be no charge for services of a party unless it is so agreed.[42] Within the terms of a joint adventure contract which provided that, in ascertaining net profits, "taxes on the capital employed and other charges as usual" were to be made, insurance is a "usual charge."[43] If on accounting a defendant was allowed credit for expense the plaintiff should be allowed to open the case and show his expenses.[44] Where prospective purchasers were unable to procure sufficient funds and the sale was about to fail and the brokers negotiating the sale arranged with a person to finance the entire deal for a bonus, the bonus was a legitimate and necessary expense of the sale and all those entitled to share in the commission must bear equally such expense.[45] In a venture in the sale of lands the party who advanced the money and made the purchase is entitled to be repaid

[37] Illuminated Car Sign Co. v. Wilson, 31 Ohio Cir. Ct. 87.

[38] Bane v. Dow, 80 Wash. 631, 142 Pac. 23.

[39] Wilson v. Anthony, 19 Ark. 16; Lafon v. Chinn, 6 B. Mon. (Ky.) 305; Dow v. Darragh, 48 N. Y. Super. Ct. 138.

[40] Sanguinett v. Webster, 153 Mo. 343, 54 S. W. 563; Scudder v. Budd, 52 N. J. Eq. 320, 26 Atl. 904; Dow v. Darragh, 48 Super. Ct. (N. Y.) 138.

[41] Kane v. Smith, 12 Johns. (N. Y.) 156.

[42] Hopkins Mfg. Co. v. Ruggles, 51 Mich. 474, 16 N. W. 862; Emmel v. Zapp, 112 Minn. 375, 127 N. W. 1134; Stevenson v. Maxwell, 2 Sandf. Ch. (N. Y.) 273. See Maas v. Lonstorf, 194 Fed. 577.

[43] Stone v. Wright Wire Co., 85 N. E. 471, 199 Mass. 306.

[44] Painter v. Hines, 86 Kans. 832, 122 Pac. 1036.

[45] Boqua v. Marshall, 88 Ark. 373, 114 S. W. 714.

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only what the lands cost, and can not be allowed for appreciation in the value of the land.[46] If there is an agreement for a settlement immediately at the close of the adventure, it is each party's duty to present in due time a statement of information necessary for a settlement, and failure by a party to do so may prevent his setting aside of a settlement.[47]

§ 986. Settlement—Interest.—It has been held that a party who advances more than his share of the funds is entitled to interest on the excess.[48] Interest will not be allowed on capital, however, in the absence of agreement.[49] Interest may be allowed on commissions which one party was to receive for selling lands, from the time when such commissions were earned.[50] Where there was an agreement by the purchaser of certain land that another should manage the sale thereof for ten years, and in case sufficient sales were not made within that time to reimburse the owner for his outlay, with ten per cent. interest, the manager was to receive five per cent. commissions on sales made, and, if the receipts were sufficient so as to reimburse the owner, the manager should receive one-half of the profits, it was held that on termination of the contract period the owner should be credited with interest at ten per cent. on his investment, together with disbursements for taxes, foreclosure expenses, expenses for recording mortgages, etc., and should be charged with interest at ten per cent. on all receipts.[51] Where there is a complicated adventure in the purchase of lands, the courts will work out the right to interest on advances and contributions by equitable principles.[52]

[46] Scudder v. Budd, 52 N. J. Eq. 320, 26 Atl. 904.

[47] Stewart v. Milliken, 30 Mich. 503.

[48] Buckmaster v. Grundy, 8 Ill. 626; Crenshaw v. Crenshaw, 22 Ky. L. 1782, 61 S. W. 366. Contra: Petrie v. Torrent, 100 Mich. 117, 58 N. W. 690, 59 N. W. 941.

[49] Thurston v. Hamblin, 199 Mass. 151, 85 N. E. 82. See Barry v. Bernays (Mo.), 141 S. W. 933.

[50] McCreery v. Green, 38 Mich. 172.

[51] Corbin v. Holmes, 83 C. C. A. 367, 154 Fed. 593.

[52] Boeing v. Fordney (Mich.), 150 N. W. 852.

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§ 987. Settlement—Advances.—A party who renders required services may recover their value in a proper case, and, if he fails to perform them, may be chargeable with the expense of employing others to do them.[53] One adventurer who purchases the interest of the other may charge the common fund with money advanced and with any outstanding liability in favor of third persons for which he remains liable after dissolution.[54] The joint property is bound for the repayment of advances.[55] Unless it is so provided by contract, there is no right to repayment of advances until the venture is completed.[56] If a contract called for equal contribution, a party who furnished all the capital and had entire control of the venture may charge for his services.[56a] Joint adventurers are under a joint liability to account to a co-adventurer.[57] Where the defendant and plaintiff, after the close of a farming and stock-raising business jointly operated by them, had a final accounting and agreed upon a balance, it was held that neither could claim an additional credit, in the absence of mistake or concealment by the other.[58] Where a joint adventurer authorized by associates to acquire title to land acquired an uncontemplated interest, the others may demand a proportionate share of such interest on payment of their proportionate share of expenses.[59] But a party who furnishes services as his contribution to the venture has an interest in the property and may recover for his services or compel accounting.[60]

[53] Goss v. Lanin (Iowa), 152 N. W. 43; Morris v. Wood, (Tenn.) 35 S. W. 1013. See § 350 et seq.

[54] Edson v. Gates, 44 Mich. 253, 6 N. W. 645.

[55] Furman v. McMillian, 2 Lea (Tenn.) 121; Withers v. Pemberton, 3 Coldw. (Tenn.) 56; Gee v. Gee, 2 Sneed (Tenn.) 395; Williams v. Love, 2 Head (Tenn.) 80, 73 Am. Dec. 191. Compare Crenshaw v. Crenshaw, 22 Ky. L. 1782, 61 S. W. 366.

[56] Williams v. Henshaw, 11 Pick. (Mass.) 79, 22 Am. Dec. 366.

[56a] McMullen v. Hoffman, 75 Fed. 547.

[57] Reilly v. Freeman, 1 App. Div. 560, 37 N. Y. S. 570, 73 N. Y. St. 224.

[58] Schmoker v. Miller, 89 Kans. 594, 132 Pac. 158.

[59] Hedges v. Mountjoy, 149 N. Y. S. 869.

[60] Matthews v. Kerfoot. 64 Ill. App. 571; Field v. Woodmancy, 10 Cush.

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§ 988. Termination and duration.—When the specified time of a joint adventure expires, it is ipso facto dissolved but may be continued after that time by the express or tacit agreement of the parties.[61] "Where capital is embarked in a joint adventure for a prescribed term and the parties have clearly evinced an intent that it should remain in the business until the expiration of the term, it is not to be withdrawn merely because one of the joint adventurers has died."[62] Neither party can end a joint adventure at his own volition. The duration, unless a fixed date is mentioned, continues until the purpose is accomplished; but if the adventure should require more money and time than was first estimated, the withdrawal of any party may be made without liability to the others.[63] It has been held that realty purchased in the names of joint adventurers in the pursuance of the venture is held as tenants in common, and the share of a deceased party goes to his heirs.[64] In a case of a contract for the sale of mining property on which two parties held an option, agreeing to divide the profits, one could not without the consent of the other, dissolve the agreement and transact the business in his own name, and disregard the other's right to share in profits.[65]

§ 989. Adventurer's lien.—A party to a joint adventure who advances money for its carrying on, has a lien on the property of the venture, similar in all respects to a partner's lien.[66]

§ 990. Actions between joint adventurers.—The general rule is that an equitable action for an accounting is the proper

(Mass.) 427; Edson v. Gates, 44 Mich. 253, 6 N. W. 645; Sanguinett v. Webster, 153 Mo. 343, 54 S. W. 563; Jones v. Davis, 48 N. J. Eq. 493, 21 Atl. 1035; Altimus v. Elliott, 2 Pa. 62.

[61] Keller v. Fitzgerrell, 158 Ill. App. 534.

[62] Braddock v. Hinchman, 78 N. J. Eq. 270, 79 Atl. 419.

[63] Goss v. Lanin (Iowa), 152 N. W. 43.

[64] Walcoff v. Bittker, 67 Misc. 414, 122 N. Y. S. 680.

[65] Chambers v. Mittnacht, 23 S. Dak. 449, 122 N. W. 434.

[66] In re Kessler, 174 Fed. 906; Smith v. The Saugerties, 44 Fed. 625; Davis v. Kellar, 25 Ky. L. 279, 74 S. W. 1100; Withers v. Pember-

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remedy whereby a party in a joint adventure may recover his share of profits or charge his co-adventurer with liability for losses.[67] If there is a disagreement between the parties, a dissolution of the joint adventure may be sought in equity by any party.[68] The right to an equitable action for accounting may not be precluded by a right of action at law.[69] If the venture has been closed and there is a certain sum due to one party as his share, he may recover such amount in an action at law;[70] or recover what is due him because of unequal division of profits;[71] or if a loss has been sustained, and the amount of it is certain, an adventurer may after the close of the venture, bring an action

ton, 3 Coldw. (Tenn.) 56. See Crenshaw v. Crenshaw, 61 S. W. 366, 22 Ky. L. 1782. Contra: Hirshfeld v. Weill, 121 Cal. 13, 53 Pac. 402.

[67] Bernett v. Smith-Powers Logging Co., 184 Fed. 139; Bedolla v. Williams, 15 Cal. App. 738, 115 Pac. 747; Maxwell v. McWilliams. 145 Ill. App. 155; Scudder v. Budd, 52 N. J. Eq. 320, 26 Atl. 904; Jones v. Davis, 48 N. J. Eq. 493, 21 Atl. 1035; Schantz v. Oakman, 163 N. Y. 148, 57 N. E. 288; King v. Barnes, 109 N. Y. 267, 16 N. E. 332; Marston v. Gould, 69 N. Y. 220; Lobsitz v. E. Lissberger Co., 154 N. Y. S. 556; Joseph v. Sulzberger, 136 App. Div. 499, 121 N. Y. S. 73; Hathaway v. Clendening, 135 App. Div. 407, 119 N. Y. S. 984; Berg v. Gillender, 115 App. Div. 288, 100 N. Y. S. 792; Boice v. Jones, 101 App. Div. 547, 94 N. Y. S. 896; Spier v. Hyde, 92 App. Div. 467, 87 N. Y. S. 285; Bradley v. Wolff, 40 Misc. 592, 83 N. Y. S. 13; Parks v. Gates, 54 App. Div. 512, 66 N. Y. S. 1034; Ross v. Willett, 76 Hun 211, 58 N. Y. St. 694, 27 N. Y. S. 785; Hollister v. Simonson, 18 App. Div. 73, 45 N. Y. S. 426; Reilly v. Freeman, 1 App. Div. 560, 73 N. Y. St. 224, 37 N. Y. S. 570; Stitzer v. Fouder, 214 Pa. 117, 63 Atl. 421; Smith v. Corbett, 16 West. L. R. (B. C.) 257.

[68] Jackson v. Hooper, 76 N. J. Eq. 185, 74 Atl. 130.

[69] Saunders v. McDonough (Ala.), 67 So. 591.

[70] Wann v. Kelley, 2 McCrary (U. S.) 628, 5 Fed. 584; Noyes v. Barnard. 63 Fed. 782, 11 C. C. A. 424; Hourquebie v. Girard, 2 Wash. (C. C.) 212, Fed. Cas. No. 6732; Beckwith v. Talbot, 2 Colo. 639; Hurley v. Walton, 63 Ill. 260; Seehorn v. Hall, 130 Mo. 257, 32 S. W. 643, 51 Am. St. 562; Felbel v. Kahn, 29 App. Div. 270, 51 N. Y. S. 435; Cleveland v. Farrar, 4 Brews. (Pa.) 27; Annon v. Brown, 65 W. Va. 34, 63 S. E. 691; Ledford v. Emerson, 140 N. Car. 288, 52 S. E. 641; Corotinsky v. Maimin, 37 Misc. 777, 76 N. Y. S. 924; Fry v. Potter, 12 R. I. 542. Compare Ross v. Willett, 76 Hun 211, 58 N. Y. St. 694, 27 N. Y. S. 785, and Joseph v. Sulzberger, 136 App. Div. 499, 121 N. Y. S. 73.

[71] Wright v. Cumpsty, 41 Pa. St. 102; Sheldon v. Wood, 2 Bosw. (N. Y.) 267.

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at law to compel a coparty to contribute thereto.[72] An action at law will also lie to recover the amount which a party has agreed to pay into the adventure, upon his failure and refusal to pay it.[73] If property is paid for by one party where a contract requires equal investment on a joint adventure a bill for contribution may be maintained before the sale of the said property by the one advancing the funds.[74] A rescission of the contract is not warranted if the party in whose name the common property stands fails to make an honest sale of it and account for the proceeds. The remedy in this case lies in action for a sale of the property, division of the net proceeds, and damages suffered through the misconduct of his associate.[75] An action for debt can not be brought on a contract of joint adventure, by which the parties were to share in profits and losses.[76] In one case the rights against each other as to common property of persons engaged in a joint venture, were held analogous to those of tenants in common.[77] One co-adventurer can recover from another half the difference between the price which that other represented that he paid for property for the joint enterprise and the actual price paid, whether or not plaintiff was financially injured.[78]

§ 991. **Actions—Illustrations.**—It has been held that a bill to compel an accounting by a joint adventurer, under a contract by which the plaintiff was to receive a share of the profit of the adventure, must show that the joint venture had reached determination and profit had been made, that the venture had reached a point where the defendant corporation had been reim-

[72] Peltier v. Sewall, 12 Wend. (N. Y.) 386; Burleigh v. Bevin, 22 Misc. 38, 48 N. Y. S. 120; Fry v. Potter, 12 R. I. 542.

[73] Pillsbury v. Pillsbury, 20 N. H. 90; Finlay v. Stewart, 56 Pa. 183; Armstrong v. Henderson, 99 Va. 234, 37 S. E. 839, 3 Va. Sup. Ct. Rep. 142. Compare Williams v. Henshaw, 11 Pick. (Mass.) 79, 22 Am. Dec. 366.

[74] Kimball v. Williams, 51 N. Y. App. Div. 616, 65 N. Y. S. 69.

[75] Hollister v. Simonson, 170 N. Y. 357, 63 N. E. 342.

[76] Jones v. McNally, 53 Misc. 59, 103 N. Y. S. 1011.

[77] Hancock v. Tharpe, 129 Ga. 812, 60 S. E. 168.

[78] Humburg v. Lotz, 4 Cal. App. 438, 88 Pac. 510.

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bursed its outlay, so that a profit was being currently made, or that defendant was misconducting itself with respect to the business and could be held to have legally perpetrated a fraud on the plaintiff.[79] Where one adventurer made a voluntary payment of a sum received by him as individual profits under a mistaken view of the law to one not entitled to the accounting, his liability to account to those parties who are entitled thereto was not discharged.[79a] A contract for the manufacture of plaintiff's logs into lumber and the sale of the product for the joint account of both plaintiff and defendant, after deducting certain expenses from the proceeds, required defendant to keep the logs, lumber, and accounts separate from defendant's other logs, lumber and accounts, and this was held to be a necessary implication that defendant's accounts should form the primary basis of settlement, and such accounts could not be rejected and a different method of determination and settlement substituted, unless there was shown fraud, bad faith, or substantial mistake of a character sufficient to stamp the supposed accounts as untrustworthy in substance.[80] Where one party induced the other to purchase for their joint account a block of mining stock, the first party agreeing to pay one-half of the cost and sell the stock at an advance for their joint interest, and thereafter refusing either to sell the stock or pay his share of the price, the other party had a cause of action for damages for breach of the agreement, and also an action for contribution of one-half of the expense necessarily incurred in the joint enterprise.[81] Where the complaint fails to allege a cause of action for an accounting or for contribution, the facts may be sufficient to constitute a cause of action for terminating the joint engagement; but if the prayer for relief is for a sum of money only, the complaint does not state facts sufficient to constitute a cause of action for an accounting and

[79] Simmons v. Lima Oil Co., 71 N. J. Eq. 174, 63 Atl. 258.

[79a] Maxwell v. McWilliams, 145 Ill. App. 155.

[80] Wisconsin Sulphite Fibre Co. v. D. K. Jeffris Lumber Co., 132 Wis. 1, 111 N. W. 237.

[81] Davidor v. Bradford. 129 Wis. 524, 109 N. W. 576.

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for contribution.[82] It was held that the fact that one of the plaintiffs was in pari delicto with the defendant in converting money advanced by the plaintiffs to purchase mining claims in a joint adventure did not prevent the other plaintiff from recovering.[83] Where joint adventurers agreed that the title to land held by another adventurer, now dead, should rest in the defendant, and a percentage of the costs of the proceedings should be paid by the plaintiff, the plaintiff may demand an accounting in order to ascertain his share.[84] The measure of damages for negligence of a woodsman and cruiser, who showed plaintiffs a different and more valuable timber tract than that jointly purchased by them and the cruiser with plaintiff's money, would be the difference between the value of the land actually purchased and the land which plaintiffs thought they were purchasing.[85] The plaintiff, in an action to recover profits of a joint venture, must plead and prove his right to a share of the profits and that the defendant has received that share and is withholding it from the plaintiff.[86] If there are three co-adventurers and one purchases the interest of another, he may alone sue the third for his share of profits.[87] If two persons enter into a joint venture in the formation of a corporation, one may bring an action for damages against the other for breach of the contract.[88] Where the owner of certain building lots entered into a joint adventure with another party for the sale of them, and afterward erected expensive buildings on the lots, making such sale impossible, the court held that an action in equity would lie for an accounting of the profits, based on the value of the lots at the time performance of the adventure was made impossible, but that an action at law was not proper.[89] An action on contract was held to be

[82] Jones v. McNally, 53 Misc. 59, 103 N. Y. S. 1011.

[83] Rever v. Blaisdell, 26 Colo. App. 387, 143 Pac. 385.

[84] Hedges v. Mountjoy, 149 N. Y. S. 869.

[85] Knudson v. George, 157 Wis. 520, 147 N. W. 1003.

[86] Kennebec &c. R. Co. v. White, 38 Maine 63; Dorr v. McKinney, 9 Allen (Mass.) 359; Pierce v. McDonald, 153 N. Y. S. 810.

[87] Snow v. Rudolph (Tex. Civ. App.), 131 S. W. 249.

[88] McIntire v. Carr, 164 Mich. 37, 128 N. W. 1079.

[89] Fox v. Mahony, 91 App. Div. 364, 86 N. Y. S. 679.

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bad where it was alleged that the defendant purchased goods for a joint adventure, and refused to deliver up to the plaintiff one-half of the said goods when the plaintiff offered payment for half of them because there is no obligation on the part of an adventurer to divide the goods, the possession of one being the possession of the others.[90] Distribution of profits may be compelled on the termination of a joint adventure, or if the parties advancing money have already received an amount of profit, distribution may be compelled at reasonable times, or if one associate is misconducting himself and perpetrating a fraud on his co-adventurers, the adventure may be terminated.[91] The aid of a court of equity may be sought to dissolve a joint adventure where there is a disagreement between the associates.[92] It has been held that in an action for an accounting of the profits it is not necessary to make a nonresident associate in a joint adventure a party, and where no property of a deceased adventurer is within the jurisdiction of the court the representative of his estate is not necessarily a party.[93] Action can not be brought upon the agreement of one party to an adventure to purchase, upon demand within a certain time, the interests of his co-adventurers at the amount they contributed, before a tender of such conveyance of such interest is made.[94] It has been held that the injured plaintiffs have a right to an accounting from a defendant who conspired with one plaintiff to induce the other plaintiffs to pay twenty-five thousand dollars for mining claims for which he paid six hundred twenty-five dollars, even though he only dealt with the plaintiff with whom he was in conspiracy.[95]

§ 992. Set-off—Limitation of actions.—Payments made by the defendant on behalf of the plaintiff in connection with an action on a common venture may be set off by his associate

[90] Dorr v. McKinney, 9 Allen (Mass.) 359.

[91] Simmons v. Lima Oil Co., 71 N. J. Eq. 174, 63 Atl. 258.

[92] Jackson v. Hooper (N. J. Ch.), 74 Atl. 130.

[93] Angell v. Lawton, 76 N. Y. 540.

[94] Delaware Trust Co. v. Calm, 195 N. Y. 231, 88 N. E. 53.

[95] Rever v. Blaisdell, 26 Colo. App. 387, 143 Pac. 385.

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against the demands of the plaintiff,[96] even though the plaintiff can not prove what profits defendant and other associates made in the transaction in which such payments were made on his account.[97] However, when suit is brought by one party against the trustee of the common fund and other associates in a joint adventure to obtain his share of the fund, one of the defendants to the agreement can not set off against the demand a debt owing him personally by the plaintiff.[98] Any claim held by a party to a joint venture against a coparty may be used as a counterclaim in an action to recover profits.[99] The statute of limitations, it has been held, in regard to actions between joint adventurers, begins to run as to advances from the time of payment.[1] A right of action for breach of a contract to purchase stock for the joint account of several parties accrues when the one purchasing the stock refuses on demand to transfer to a coparty his share.[2] Where associates in a joint adventure delayed instituting a suit against other parties because they were unaware of the facts which entitled them to a share in the profits, it is not laches.[3]

§ 993. **Parties and pleading.**—All persons associated in an adventure are not necessary parties to actions between two or more associates,[4] but where a corporation is formed by the parties to take over the common property, in case of a suit to determine the respective interests of the associates in the property and for distribution of the corporate stock the corporation is a proper party to the suit.[5] A demurrer will lie to a complaint in a suit to recover a share of the profits where there is a failure to allege that profits have been received by the defendant,[6] but

[96] Armstrong v. Henderson, 99 Va. 234, 37 S. E. 839.

[97] Armstrong v. Henderson, 99 Va. 234, 37 S. E. 839.

[98] Hirshfeld v. Weill, 121 Cal. 13, 53 Pac. 402.

[99] Farmer v. Underwood, 146 Iowa 345, 125 N. W. 212.

[1] Stover v. Flack, 30 N. Y. 64.

[2] Joseph v. Sulzberger, 136 App. Div. 499, 121 N. Y. S. 73.

[3] Lind v. Webber, 36 Nev. 623, 134 Pac. 461.

[4] Cole v. Bacon, 63 Cal. 571; Beckwith v. Talbot, 2 Colo. 639.

[5] King v. Barnes, 109 N. Y. 267, 16 N. E. 332.

[6] Dorr v. McKinney, 9 Allen (Mass.) 359.

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a complaint will not be subject to demurrer merely because of surplusage, pleading of evidence, or matters of inducement.[7] It is not necessary for an adventurer asking an accounting and a share in profits to plead full performance of the contract on his part, or that he stood at all times ready, willing, and able to fulfil his part of the agreement.[8] It is held that a defendant in an action for an accounting can not recover for expenses more than the maximum amount pleaded in a sworn answer.[9]

§ 994. Evidence—Judgment.—The party asking for an accounting or suing for a money balance must make out his claim by sufficient evidence.[10] Proof of the rescission or abandonment of contract for a joint adventure is a defense against a suit based on such a contract.[11] There is a presumption that profits are what is ordinarily meant by the term, and where the complaint asks for a division of profits merely without explanation, evidence is inadmissible to show that they were to be deter-

[7] Marvin v. Yates, 26 Wash. 50, 66 Pac. 131.

[8] Saunders v. McDonough (Ala.), 67 So. 591.

[9] Wisconsin Sulphite Fibre Co. v. D. K. Jeffris Lumber Co., 132 Wis. 1, 111 N. W. 237.

[10] Painter v. Hines, 86 Kans. 832, 122 Pac. 1036; Lane v. Fenn, 65 Misc. 336, 120 N. Y. S. 237; Wisconsin Sulphite Fibre Co. v. D. K. Jeffris Lumber Co., 132 Wis. 1, 111 N. W. 237. For cases where evidence supported claim to an accounting, see Bernitt v. Smith-Powers Logging Co., 213 Fed. 378; Ijams v. Andrews, 81 C. C. A. 109, 151 Fed. 725; Boqua v. Marshall, 88 Ark. 373, 114 S. W. 714; Lane v. Fenn, 65 Misc. 336, 120 N. Y. S. 237; Bloom v. McPhee & McGinnity Co., 25 Colo. App. 256, 143 Pac. 825; Advance Realty Co. v. Nichols, 126 Minn. 267, 148 N. W. 65; Tate v. Kloke, 93 Neb. 382, 140 N. W. 278; Sullivan v. King, 67 Ore. 428, 136 Pac. 335; Morin v. Pilon, 158 Wis. 411, 149 N. W. 140. For cases in which the evidence was insufficient to entitle the plaintiff to the relief sought, see Maas v. Lonstorf, 194 Fed. 577; Blackwell v. Banks, 132 Ga. 845, 65 S. E. 84; Briggs v. Boynton, 212 Mass. 5, 98 N. E. 794; Streat v. Wolf, 135 App. Div. 81, 119 N. Y. S. 779; Lewis v. Dean, 76 Wash. 596, 137 Pac. 341; Dale v. Duryea, 49 Wash. 644, 96 Pac. 223; Wisconsin Sulphite Fibre Co. v. D. K. Jeffris Lumber Co., 132 Wis. 1, 111 N. W. 237; Humburg v. Lotz, 4 Cal. App. 438, 88 Pac. 510; Lauer v. Kaufman (Colo. App.), 145 Pac. 709; Goss v. Lanin (Iowa), 152 N. W. 43; Quinn v. Hayden, 219 Mass. 343, 106 N. E. 1002; Vermeule v. Vermeule, 82 N. J. Eq. 434, 89 Atl. 535; Smith v. Kinney, 72 Ore. 519, 143 Pac. 901.

[11] Brady v. Colhoun, 1 Penr. & W. (Pa.) 140.

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mined in an unusual manner.[12] In action for a share of profits in a joint venture in the purchase of land, evidence of the value of the lands and that the vendor paid no commission to plaintiff was admissible.[13] It is sufficient to establish the existence of a joint adventure, that the conduct of the parties corroborates the fact, against the denial of only one defendant.[14] If one party is under duty to account, admissions made by him may be proved in an action against his executor, and will support a verdict for a less sum than he admitted to be due.[15] Conflicting evidence concerning a material issue in an action between parties should be submitted to the jury.[16] Where judgment is rendered for one party against associates in a joint adventure for conversion of property, it should be against all parties jointly participating in the conversion.[17] If the amount of interest on advances is limited by the decree, it does not affect the rate of interest on expenditures.[18] It is improper to enter an interlocutory judgment for an accounting in an action to dissolve a joint partnership and for an accounting before it is determined that such action is necessary.[19]

§ 995. Actions by or against third persons.—If one party in the due course of execution of a joint adventure incurs liabilities, they are binding upon all the parties jointly,[20] and the fact that their interests are different in the property purchased, when such difference is not brought to the notice of the vendor, does not affect their joint liability,[21] nor does an agreement between

[12] Chilberg v. Jones, 3 Wash. 530, 28 Pac. 1104.

[13] Sonnesyn v. Hawbaker, 127 Minn. 15, 148 N. W. 476. See also Woolley v. Canyon Exch. Co. (Tex. Civ. App.), 159 S. W. 403.

[14] Mestier v. A. Chevalier Pavement Co., 108 La. 562, 32 So. 520.

[15] Marvin v. Yates, 26 Wash. 50, 66 Pac. 131.

[16] Schmoker v. Miller, 89 Kans. 594, 132 Pac. 158; Sullivan v. Ross, 124 Mich. 287, 82 N. W. 1071.

[17] Reilly v. Freeman, 1 N. Y. App. Div. 560, 73 N. Y. St. 224, 37 N. Y. S. 570.

[18] Stevenson v. Maxwell, 2 Sandf. Ch. (N. Y.) 273.

[19] Hoisting Machinery Co. v. Scofield Engineering Co., 147 N. Y. S. 564.

[20] Slater v. Clark, 68 Ill. App. 433.

[21] Mission Ridge Land Co. v. Nixon (Tenn. Ch. App.), 48 S. W. 405.

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themselves limiting the amount of liability of some to the capital contributed by them, affect their liability to third persons.[22] If, however, the party creating the liability does so in the performance of obligations imposed upon him individually by the contract, or if, under the statute of frauds the contract is void, the other associates in a joint adventure are not bound therefor.[23] No one can be held liable as a party to a joint adventure where it can not be proved that such an association actually existed or that he was a member of it.[24] Creditors may bring action against a managing associate where he has assumed accounts due them by the association.[25] Two individual owners of horses who furnished them to a third person and agreed to divide the profits, could not join and sue the hirer for negligent killing of a horse, where there was no agreement for joint ownership of the horses.[26] Where one party is authorized to carry on the business of a joint adventure in his individual name, he may maintain an action against a stranger to recover sums due on account of the joint enterprise.[27] In order to make nonjoinder of parties to an action against joint adventurers available it must be pleaded.[28]

[22] Benners v. Harrison, 19 Barb. (N. Y.) 53. Compare Cooper v. Frierson, 48 Mass. 300.

[23] Lafon v. Chinn, 6 B. Mon. (Ky.) 305; Chamberlain v. Dow, 10 Mich. 319; Cooper v. Frierson. 48 Miss. 300.

[24] Poulson v. De Navarro. 57 App. Div. 623, 68 N. Y. S. 177.

[25] Secor v. Law, 42 N. Y. 525, 4 Abb. Dec. 188.

[26] Whatley v. Jamison, 14 Ga. App. 209, 80 S. E. 702.

[27] Howe v. Savory, 49 Barb. (N. Y.) 403.

[28] Derickson v. Whitney, 6 Gray (Mass.) 248.

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CHAPTER XXXI

LIMITED PARTNERSHIPS

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§ 1000. **Definition—Distinguished from general partnership.**—A limited partnership is a partnership in which the liability of some of its members to bear any losses the partnership may sustain is limited to a defined amount, while the liability

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of its other members is not so limited. It must at all times consist of at least one general partner to be answerable to the public under the law for all the obligations of the partnership and at least one partner whose liability is limited to the sum contributed by him to the firm at its organization or to some amount provided by the statute. It is therefore properly based only on the existence of a general partnership and its general partners have the same rights and incur the same liability that members of a general partnership incur, but their duties are even more burdensome since they are deprived of any assistance from the limited members.[1] The liability of a limited partner is generally limited by the statute to the amount he has contributed to the partnership at its formation. However, in some states his liability is fixed by statute otherwise. It is a kind of a union of capital and labor as expressed by the Supreme Court of Connecticut[2] in construing the limited partnership statute in which the court said: "We find a clear general purpose and intent by the legislature to encourage trade by authorizing and permitting a capitalist to put his money into a partnership with general partners possessed of skill and business character only, without becoming a general partner or hazarding anything in the business except the capital orignally subscribed." The limited or special members of such a partnership are generally prohibited by the statute from participating in the conduct of the firm's business and by violating such prohibition they become liable to third persons, as general partners, while in a general partnership each member has an equal voice in the conduct of the partnership business. In some jurisdictions limited partnerships have been termed by the courts special partnerships, but as now used in most states the term special partnerships has reference, more accurately speaking, to a partnership for a single transaction only or for the conduct of a special kind of business only and can have no

[1] Richardson v. Carlton, 109 Iowa 515, 80 N. W. 532; Spalding v. Black, 22 Kans. 55; Bee v. Merrifield, 28 Hun (N. Y.) 219; Madison County Bank v. Gould, 5 Hill (N. Y.) 309; Whittemore v. Macdonnell, 6 U. C. C. P. 547. See ante § 146.

[2] Clapp v. Lacey, 35 Conn. 463.

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proper reference to limited partnerships, since they are formed under the statutes to transact business for a period of time usually covering several years and under their organization they are permitted to transact any kind of legitimate business, except banking and insurance, and in some states they are authorized to transact one or the other or both of these classes of business also. Strictly speaking, no partnership should be termed a limited one unless it has two classes of members, one class having limited liability and the other unlimited liability. Such partnerships in some respects partake of the nature of corporations; they can only exist where authorized by statute and the liability of some of their members is limited like the liability of stockholders in some kinds of corporations, their business is to be conducted by the general partners while the business of a corporation is to be conducted by its board of directors, but this distinction must always be kept in mind, the directors of a corporation are selected by the stockholders and may be changed by such stockholders, while the general partners in a limited partnership are not selected by the limited members nor can they be changed by them. A corporation is an artificial person and constitutes a legal entity, and its stockholders may transfer their stock, while a limited partnership, aside from its members, does not become a legal entity, and generally its members may not change except upon dissolution and reorganization under the statute.

§ 1001. Distinguished from joint adventures and joint stock companies.—When a number of persons by articles of association form a company for profit, possessing a common capital which is divided into shares, one or more of which is possessed by each member, which shares may be transferred by their owners, such an association is known as a joint stock company. It is not a corporation because it does not comply with the laws authorizing the formation of a corporation, and hence never becomes a single entity or artificial person,[8] but it has been

[8] Wadsworth v. Duncan, 164 Ill. 360, 45 N. E. 132; Hodgson v. Baldwin, 65 Ill. 532; Manning v. Gasharie, 27 Ind. 399; McGreary v. Chandler, 58 Maine 537; Boston & A. R. Co. v. Pearson, 128 Mass. 445; Skinner

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generally regarded by the courts merely as a partnership, and its rights and the liability of its members governed by much the same rules which regulate the conduct of a general partnership, with certain exceptions provided by statutes. It was said by a New York court,[4] "That a joint stock company is a partnership with some of the powers of a corporation."[5] Limited associations have been formed under the statutes of some of the states, in which all the partners or stockholders have a limited liability only. They are sometimes called "Partnership associations limited" or "Limited partnership associations." Some courts in their decisions relating to these associations apply the analogies of the law of corporations to them,[6] but in whatever points a joint stock company may resemble a corporation it differs radically from a limited partnership, for while the holders of its shares of stock may under the statute have their liability limited, the liability of all of them is limited precisely the same, but in a limited partnership as we have seen the liability of some of the members is unlimited and that of the others is limited. Where there is no statute to the contrary the shareholders of a joint stock company, like the members of a general partnership, are liable for all the association's debts, but its business affairs are managed by a board of trustees or directors, and a shareholder not a member of the board has no participation in the management. Joint adventures are unlike limited partnerships, since those who join in them are partners therein and their liability as to third persons is equal and unlimited, but in some jurisdictions the courts have not nicely distinguished between joint adventures, special partnerships and limited partnerships, for in New York the court has held that where two persons agree to

v. Dayton, 19 Johns. (N. Y.) 513, 10 Am. Dec. 286.

[4] Van Aernam v. Blustein, 102 N. Y. 355, 7 N. E. 537, 2 N. Y. St. 470.

[5] People v. Coleman, 133 N. Y. 279, 31 N. E. 96, 16 L. R. A. 183. But see opinion of O'Brien, J., in Hibbs v. Brown, 190 N. Y. 167, 82 N. E. 1108.

[6] Raymond v. Colton, 104 Fed. 219, 43 C. C. A. 501; Blatchford v. Ross, 5 Abb. Pr. (N. S.) 434, 54 Barb. (N. Y.) 42, 37 How. Pr. 110; Spraker v. Platt, 158 App. Div. 377, 143 N. Y. S. 440; Nelson v. Drake 14 Hun (N. Y.) 465.

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the purchase and sale of goods on a joint account, each sharing in the profits and losses, it is a joint adventure or limited partnership.[7] There is a tendency of the courts to hold that joint stock companies and joint adventures are not strictly to be regarded as partnerships, nor yet as corporations, but that being neither the one or the other the rights and liabilities of those interested in them are to be determined from the facts and circumstances of each case, and that neither the law governing partnerships or that governing corporations will apply to them. The courts in some states seek to establish a new system of law to govern the rights of such organizations, some applying by analogy the principles of corporation law to them and some the principles governing partnerships. In a case in New York,[8] where a syndicate was formed to buy a railroad and construct a part of one and purchase and operate and sell coal mines along its lines, and in the end, upon the sale of the property, divide the proceeds pro rata among the members, the court in construing the powers under the syndicate contract and the liability of the syndicate members said: "This was not strictly a partnership, though it had many of the features of such a relation. It was what is now generally known as a joint adventure rather than a commercial partnership. The authorities in some of the states hold that in the prosecution of the venture each party has the same full power to bind his associates in any contract in regard to the venture that an ordinary commercial partner would have. We are not now inclined to hold that doctrine in its full integrity, but such a ruling is not necessary to the disposition of the case," but whatever may be the status of joint adventures and joint stock companies under the law, neither can be properly denominated limited partnerships under the definition of such partnerships.

§ 1002. **Origin and history.**—Limited partnerships are said to have been known and recognized in Pisa and Florence

[7] Lobsitz v. E. Lissberger Co., 154 N. Y. S. 556.

[8] Jones v. Gould, 209 N. Y. 419, 103 N. E. 720.

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as early as the twelfth century, and in Florence they have been called "La Societe en Commondite" since the fourteenth century. Such partnerships were unknown in England until a comparatively few years ago. During the middle ages wealth was largely in the hands of the nobles and clergy, and it was hardly thought to be proper for their class to engage in mere trade, hence they had a plan adopted in Italy by which they could invest their money in business and receive the profits without being generally known as engaged in trade. The plan was early carried to France, where it has ever since been in force. When Louisiana was a French territory naturally such partnerships were provided for there and were designated as "partnerships in commendam." In 1822 a law was enacted by the legislature of the state of New York authorizing the organization of limited partnerships.[9] This law was patterned after the French law, and soon after the state of Connecticut passed a similar law, also taken from the French but not copied from the New York statute.[10] In 1836 Pennsylvania enacted a statute very similar to the New York law, and since that time nearly all of the states have adopted laws providing for the formation of limited partnerships, some following the New York statute and others the Connecticut law. The general features of all the statutes are so nearly alike in their provisions that the subject can be properly treated as a whole, but since the statutes of the various states differ in some provisions, one must examine the statutes of his own state to ascertain the purposes for which such a partnership may be created, and the steps necessary to create it.[11] All these statutes are designed to encourage capitalists to invest their money in trade and commerce, by limiting their liability. This form of

[9] Laws New York 1822, p. 259. See also Batchelder v. Altheimer, 10 Mo. App. 181; Ames v. Downing, 1 Bradf. Sur. (N. Y.) 321.

[10] Clapp v. Lacey, 35 Conn. 463.

[11] Clapp v. Lacey, 35 Conn. 463; Anderson v. Stone, 24 Ill. App. 342; Spalding v. Black, 22 Kans. 55; Continental Nat. Bank v. Strauss, 137 N. Y. 553, 32 N. E. 1066; White v. Eiseman, 134 N. Y. 101, 31 N. E. 276; Ames v. Downing, 1 Bradf. Sur. (N. Y.) 321; Fourth St. Nat. Bank v. Whitaker, 170 Pa. St. 297, 33 Atl. 100; Patterson v. Holland, 7 Grant Ch. (U. C.) 1.

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partnerships was much in use before the growth of corporations, but since the liability of stockholders in some kinds of corporations may be limited, probably the number of limited partnerships have not increased correspondingly with the growth of trade generally.

§ 1003. Governed entirely by statutes.—The limited partnership is a child of the statute law,[12] and while the law governing the rights of a general partnership will apply to the acts and conduct of the general partners in a limited partnership and their liability will be so measured, the rights of limited partners and the public in dealing with the partnership in which they are interested as limited members, are prescribed by the statute, and no such thing as a limited partnership can exist in the absence of a statute providing for its formation.[13] It can be formed only in one way and that is by taking the steps designated by the statute authorizing such partnerships, and since the effect of such an organization is to limit the liability of its special members and to deprive those dealing with the firm from holding such members liable for the firm's debts, these steps must be taken precisely as provided by the statute. There must be a full and fair compliance with the statute or the limited members will be held to unlimited liability the same as the general partners.

[12] Coope v. Eyre, 1 H. Bl. 37; In re Merrill, 12 Blatchf. (U. S.) 221, Fed. Cas. No. 9467, 13 Nat. Bank. Reg. 91; Peabody v. Oleson, 15 Colo. App. 346, 62 Pac. 234; Clapp v. Lacey, 35 Conn. 463; Safe-Deposit &c. Co. v. Cahn, 102 Md. 530, 62 Atl. 819; Lancaster v. Choate, 5 Allen (Mass.) 530; Pierce v. Bryant, 5 Allen (Mass.) 91; Batchelder v. Altheimer, 10 Mo. App. 181; Fifth Ave. Bank v. Colgate, 120 N. Y. 381, 24 N. E. 799, 8 L. R. A. 712, 4 Silv. Ct. App. 544; Manhattan Co. v. Laimbeer, 108 N. Y. 578, 15 N. E. 712; Van Riper v. Poppenhausen, 43 N. Y. 68; Durant v. Abendroth, 41 N. Y. Super. Ct. 53; Levy v. Lock, 5 Daly 46, 47 How. Pr. (N. Y.) 394; Jacquin v. Buisson, 11 How. Pr. (N. Y.) 385; Ames v. Downing, 1 Bradf. Sur. (N. Y.) 321; Lachaise v. Marks, 4 E. D. Smith (N. Y.) 610; Skolny v. Richter, 139 App. Div. 534, 124 N. Y. S. 152; Fanshawe v. Lane, 16 Abb. Pr. (N. Y.) 71; Tindel v. Park, 154 Pa. St. 36, 26 Atl. 300; McKnight v. Ratcliff, 44 Pa. St. 156; Singer v. Kelly, 44 Pa. St. 145; Vilas Bank v. Bullock, 10 Phila. 309, 32 Leg. Int. 66, 1 Wkly. Notes Cas. (Pa.) 219; McArthur v. Chase, 13 Grat. (Va.) 683.

[13] Henkel v. Heyman, 91 Ill. 96.

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§ 1004. Laws governing rights of partners.—As we have seen limited partnerships can only exist in pursuance of statutes, it follows that the statutes of a state can not authorize such a partnership to be formed or to do business wholly in some other state, and if this was attempted the partnership would be deemed to be a general partnership in both states.[14] However, a limited partnership duly formed pursuant to the law of the state where formed may have business transactions in other states without becoming a general partnership.[15] If such partnership is permitted to enter into contracts in a state other than where it is formed, the construction of such contract and the liability thereunder will be measured by the law of the state where the contract is made.[16] The liability of the limited partners must in general, however, be determined by the law of the state under which the limited partnership is formed.[17] A limited partnership in its very nature is based upon and can not exist without general partners or a general partner. It follows where a limited partnership transacts any business in a state other than where formed, the rights and liabilities of the general members of such partnership, in the absence of a statute, are to be ascertained under the principles of the common law which apply to those persons, associated in the ordinary partnership relation.[18] But a case decided in Michigan reiterates the former holding of the Supreme Court of that state, "that the law governing corporations, rather than the law governing copartnerships, is applicable to a partnership lim-

[14] Jacquin v. Buisson, 11 How. Pr. (N. Y.) 385.

[15] Lawrence v. Batcheller, 131 Mass. 504; Locke v. Lewis, 124 Mass. 1, 26 Am. Rep. 631; King v. Sarria, 7 Hun (N. Y.) 167; Hogg v. Orgill, 34 Pa. St. 344; Hastings v. Hopkinson, 28 Vt. 108.

[16] Locke v. Lewis, 124 Mass. 11, 26 Am. Rep. 631; King v. Sarria, 69 N. Y. 24, 25 Am. Rep. 128; Ward v. Newell, 42 Barb. (N. Y.) 482, 28 How. Pr. 102; Barrow v. Downs, 9 R. I. 446, 11 Am. Rep. 283.

[17] Lawrence v. Batcheller, 131 Mass. 504; Locke v. Lewis, 124 Mass. 1, 26 Am. Rep. 631; Gray v. Gibson, 6 Mich. 300; Taylor v. Webster, 39 N. J. L. 102; Hogg v. Orgill, 34 Pa. St. 344; Barrow v. Downs, 9 R. I. 446, 11 Am. Rep. 283.

[18] Jemison v. Dearing, 41 Ala. 283; Spalding v. Black, 22 Kans. 55; Safe-Deposit Co. v. Cahn, 102 Md. 530, 62 Atl. 819; Lancaster v. Choate, 5 Allen (Mass.) 530.

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ited."[19] In states where the statutes authorizing the organization of limited partnerships provide for the formation of joint stock companies or associations, and treat them as limited partnerships, there may be some tendency toward applying corporation law to such partnerships, but it seems quite inconsistent to do so in states where the New York or Connecticut laws have been followed in authorizing the formation of limited partnerships. So long as such organizations are held to be partnerships under the management of the general or unlimited members, it would seem that the laws governing partnerships rather than the laws governing corporations should be applied to limited partnerships.

§ 1005. Construction of limited partnership statutes.— There is a great deal of conflict in the decided cases as to whether statutes governing limited partnerships should be construed strictly or liberally, and while there is very respectable authority for the proposition that statutes which authorize the formation of limited partnerships must be strictly construed against limited partners,[20] it is believed the weight of authority is that such statutes in so far as they do not affect the rights of third persons should be liberally construed so as not to destroy the protection of the statute extended to those who invest their capital and become limited partners. In an early case in Pennsylvania[21] it was said: "It is not intended to deny that the requirements of the statute must be strictly pursued in organizing and conducting limited partnerships, but this should not change the rule of interpretation which requires in public beneficial statutes that construction which will promote their objects rather than destroy them." It has recently been well said that "the courts should adopt and enforce a reasonable construction of the statute which, on the one hand, will not defeat one of the objects of the law, which is to induce the investment of capital in business, and upon the other hand will not under cover of a substantial com-

[19] Armstrong v. Stearns, 156 Mich. 597, 121 N. W. 312.

[20] Cummings v. Hayes, 100 Ill. App. 347.

[21] Singer v. Kelly, 44 Pa. St. 145.

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pliance with the requirements of the statute fritter away the protection which the law has thrown around those who deal with the firm." But good faith and honest intention will not absolve a special partner from general liability, any more than will the fact that the creditor has not been injured by the noncompliance with the statute. Yet, on the other hand, actual compliance does not demand that a limited partner be deprived of his rights, as such, by reason of mere formal defects or technical violations.[22] A belief in the truth of the statements which he makes in a renewal certificate does not, however, save him from the penalty attaching to their falsity.[23] It has been said that where no governing statute exists, the rights and liabilities of members of a limited partnership are to be ascertained by reference to those principles of the common law which obtain when those associated in the ordinary partnership relation are involved.[24] Speaking of the construction that should be given to such statutes the Supreme Court of Pennsylvania[25] has well said that, "The statute in our judgment is not in derogation of the common law because limited partnerships are unknown to that law, but are enabling, enlarging and regulating statutes, remedial in character and not therefore to be construed strictly." In construing such a statute the New York court[26] said, "This may well be regarded as a

[22] R. S. Oglesby Co. v. Lindsey, 112 Va. 767, 72 S. E. 672, Ann. Cas. 1913 B, 913n.

[23] Reitzel v. Haines, 170 Pa. St. 306, 33 Atl. 103, 37 Wkly. Notes Cas. 80. For renewal certificate held sufficient provided the original capital remained intact, although the special partners were named as individuals, instead of a firm as required by statute, see Patterson v. Youngs, 139 N. Y. S. 670. See also Pfirmann v. Henkel, 1 Ill. App. 145; Durant v. Abendroth, 69 N. Y. 148, 25 Am. Rep. 158; Van Ingen v. Whitman, 62 N. Y. 513; Ward v. Newell, 42 Barb. (N. Y.) 482, 28 How. Pr. 102.

[24] Jemison v. Dearing, 41 Ala. 283; Spalding v. Black, 22 Kans. 55; Safe-Deposit &c. Co. v. Cahn, 102 Md. 530, 62 Atl. 819; Lancaster v. Choate, 5 Allen (Mass.) 530; Nutting v. Ashcroft, 101 Mass. 300; Jaffe v. Krum, 88 Mo. 669; Ames v. Downing, 1 Bradf. Sur. (N. Y.) 321; Continental Nat. Bank v. Strauss, 60 N. Y. Super. Ct. 151, 43 N. Y. St. 68, 17 N. Y. S. 188; Jacquin v. Buisson, 11 How. Pr. (N. Y.) 385.

[25] Reitzel v. Haines, 170 Pa. St. 306, 33 Atl. 103.

[26] Van Riper v. Poppenhausen, 43 N. Y. 68.

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remedial statute and should receive a liberal construction, with a view to suppress the mischief and advance the remedy." The tendency of judicial decisions is to give to such statutes ordinary, fair and reasonable construction; in short, such a construction as will reasonably safeguard the rights of the public and at the same time induce the investment of capital in such enterprises.[27]

§ 1006. **Nature of business prescribed by law.**—While the statutes of the various states are not entirely alike in limiting the kind of business limited partnerships may be formed to conduct, still they generally provide for the formation of such partnerships to transact any kind of lawful business except insurance and banking, which are usually prohibited.[28] Where it is attempted to form a limited partnership to transact any kind of business, not authorized by the statute under which it is formed, if the business to be conducted is not unlawful the partnership will not be invalid, but will be held to be a general partnership in which all the partners will be held to unlimited liability.[29]

§ 1007. **Certificate or partnership contract.**—Persons desiring to form a limited partnership are required to make and execute such a certificate as may be prescribed by the statutes of the state in which the partnership is to be formed,[30] and file such certificate in the office where such statute requires it to be filed, which is usually the office in the county where deeds of convey-

[27] Anderson v. Stone, 24 Ill. App. 342; Ulman v. Briggs, 32 La. Ann. 655; Buck v. Alley, 45 N. Y. 488, 40 N. E. 236; Manhattan Co. v. Laimbeer, 108 N. Y. 578, 15 N. E. 712; Fifth Ave. Bank v. Colgate, 54 N. Y. Super. Ct. 188; Blumenthal v. Whitaker, 170 Pa. St. 309, 33 Atl. 103; R. S. Oglesby Co. v. Lindsey, 112 Va. 767, 72 S. E. 672, Ann. Cas. 1913 B, 913n.

[28] Burns' Rev. Ind. Stat, 1915, § 9693, where it is provided that such partnerships shall not be formed for the purpose of writing insurance. See codes and statutes of the various states, also Tracy v. Tuffly, 134 U. S. 206, 33 L. ed. 879, 10 Sup. Ct. 527; Jacquin v. Buisson, 11 How. Pr. (N. Y.) 385; Ussery v. Crusman (Tenn.), 47 S. W. 567.

[29] McGehee v. Powell, 8 Ala. 827.

[30] Cummings v. Hayes, 100 Ill. App. 347; Haggerty v. Foster, 103 Mass. 17; Selden v. Hall, 21 Mo. App. 452; Smith v. Argall, 6 Hill (N. Y.) 479; Fifth Ave. Bank v. Colgate, 54 N. Y. Super. Ct. 188; Bowen v. Argall, 24 Wend. (N. Y.) 496; Manhattan Co. v. Laimbeer, 108 N.

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ance are required to be recorded.[31] A failure to execute and file such a certificate as is required by the statute will constitute the firm a general partnership with unlimited liability,[32] and in case of failure to have the certificate recorded where the statute requires it to be recorded will render the partnership a general one.[33] The certified partnership contract called the certificate constitutes the agreement between the partners and is binding upon them whether it is sufficient to constitute a limited partnership or not. If the statute authorizing the formation of a limited partnership is not fully complied with the partners, as far as third persons are concerned, become general and are liable without limitation for the losses of the firm.

§ 1008. What certificate must contain.—The statutes very generally provide that the partnership contract shall contain: (1) The firm name to be used by the limited partnership in the conduct of its business;[34] (2) the nature of the business which the partnership intends to conduct;[35] (3) the place where

Y. 578, 15 N. E. 712; Hogg v. Orgill, 34 Pa. St. 344; Patterson v. Holland, 7 Grant Ch. (U. C.) 1; Ulman v. Briggs, 32 La. Ann. 655.

[31] Tracy v. Tuffly, 134 U. S. 206, 33 L. ed. 879, 10 Sup. Ct. 527; Henkel v. Heyman, 91 Ill. 96; Adam v. Musson, 37 Ill. App. 501; Ulman v. Briggs, 32 La. Ann. 655; Lachomette v. Thomas, 5 Rob. (La.) 172; Fifth Ave. Bank v. Colgate, 120 N. Y. 381, 24 N. E. 799, 8 L. R. A. 712, 4 Silv. Ct. App. 544; Durant v. Abendroth, 41 N. Y. Super. Ct. 59; Sheble v. Strong, 128 Pa. St. 315, 18 Atl. 397; Haddock v. Grinnell Mfg. Corp., 109 Pa. St. 372, 1 Atl. 174; Purdy v. Lacock, 6 Pa. St. 490; Ussery v. Crusman (Tenn.), 47 S. W. 567; R. S. Oglesby Co. v. Lindsey, 112 Va. 767, 72 S. E. 672, Ann. Cas. 1913 B, 913n.

[32] Haslet v. Kent, 160 Pa. St. 85, 28 Atl. 501; Vanhorn v. Corcoran, 127 Pa. St. 255, 18 Atl. 16, 4 L. R. A. 386; Spencer Optical Mfg. Co. v. Johnson, 53 S. Car. 533, 31 S. E. 392.

[33] Henkel v. Heyman, 91 Ill. 96; Purdy v. Lacock, 6 Pa. St. 490. But see Manhattan Co. v. Laimbeer, 21 Abb. N. Cas. 27, 108 N. Y. 578, 15 N. E. 712.

[34] Tracy v. Tuffly, 134 U. S. 206, 33 L. ed. 879, 10 Sup. Ct. 527; Pfirmann v. Henkel, 1 Ill. App. 145; Hardt v. Levy, 72 Hun 225, 25 N. Y. S. 248, 55 N. Y. St. 706; Blumenthal v. Whitaker, 170 Pa. St. 309, 33 Atl. 103.

[35] Tracy v. Tuffly, 134 U. S. 206, 33 L. ed. 879, 10 Sup. Ct. 527; Selden v. Hall, 21 Mo. App. 459; Fifth Ave. Bank v. Colgate, 120 N. Y. 381, 24 N. E. 799, 8 L. R. A. 712, 4 Silv. Ct. App. 544; Hogg v. Orgill, 34 Pa. St. 344; Benedict v. Van Allen, 17 U. C. Q. B. 234.

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the partnership business is to be conducted;[36] (4) the names of the general partner or partners and the names of the limited partner or partners must be stated;[37] (5) their places of residence must be given and the certificate must designate who are limited partners and who general partners;[38] (6) a statement of the time of the commencement of the partnership and when it will terminate;[39] (7) the certificate must also contain a statement showing the capital furnished by each of the limited partners and that such contributions have been paid in cash, except in states where such contributions are permitted to be made in property other than cash.[40] In case the contribution of a limited partner is not by the statute required to be made in cash, but is allowed to be made either in cash or property, the certificate must disclose its nature, and if made in property must state what kind of property and what is its actual value. The statutes in such a case usually provide that the property contributed shall have been appraised by disinterested persons and its real value thus ascer-

[36] Tracy v. Tuffly, 134 U. S. 206, 33 L. ed. 879, 10 Sup. Ct. 527; Selden v. Hall, 21 Mo. App. 452; Levy v. Lock, 5 Daly (N. Y.) 46, 47 How. Pr. 394; Patterson v. Holland, 7 Grant Ch. (U. C.) 1.

[37] Tracy v. Tuffly, 134 U. S. 206, 33 L. ed. 879, 10 Sup. Ct. 527; Fifth Ave. Bank v. Colgate, 120 N. Y. 381, 24 N. E. 799, 8 L. R. A. 712, 4 Silv. Ct. App. 544; Bowen v. Argall, 24 Wend. (N. Y.) 496; Blumenthal v. Whitaker, 170 Pa. St. 309, 33 Atl. 103; Laflin Powder Co. v. Steytler, 146 Pa. St. 434, 23 Atl. 215, 14 L. R. A. 690; Haddock v. Grinnell Mfg. Corp., 109 Pa. St. 372, 1 Atl. 174.

[38] Tracy v. Tuffly, 134 U. S. 206, 33 L. ed. 879, 10 Sup. Ct. 527; Pfirmann v. Henkel, 1 Ill. App. 145; Selden v. Hall, 21 Mo. App. 452; Lachaise v. Marks, 4 E. D. Smith (N. Y.) 610; Hardt v. Levy, 72 Hun 225, 25 N. Y. S. 248, 55 N. Y. St. 706; Haddock v. Grinnell Mfg. Corp., 109 Pa. St. 372, 1 Atl. 174; Hogg v. Orgill, 34 Pa. St. 344; Ussery v. Crusman (Tenn.), 47 S. W. 567; Benedict v. Van Allen, 17 U. C. Q. B. 234; Whittemore v. Macdonnell, 6 U. C. C. P. 547.

[39] Tracy v. Tuffly, 134 U. S. 206, 33 L. ed. 879, 10 Sup. Ct. 527; Selden v. Hall, 21 Mo. App. 452; Haggerty v. Taylor, 10 Paige (N. Y.) 262; Madison County Bank v. Gould, 5 Hill (N. Y.) 309; Blumenthal v. Whitaker, 170 Pa. St. 309, 33 Atl. 103.

[40] Tracy v. Tuffly, 134 U. S. 206, 33 L. ed. 879, 10 Sup. Ct. 527; In re Merrill, 12 Blatchf. (U. S.) 221, Fed. Cas. No. 9467; Wilson v. Bean, 33 Ill. App. 529; Haggerty v. Foster, 103 Mass. 17; Fifth Ave. Bank v. Colgate, 54 N. Y. Super. Ct. 188; Van Ingen v. Whitman, 62 N. Y. 513; Blumenthal v. Whitaker, 170 Pa.

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tained.[41] If the certificate fails to fulfil the requirements of the statute in this particular it will have the effect of making the partnership a general and not a limited one.[42] However, it has been held that a limited partner will not be deprived of the protection the statute gives him by reason of mere formal defects or technical violations,[43] but a false statement in the certificate, even if in good faith believed by a limited partner to be true, will render him liable as a general partner.[44] If the contribution is stated to be property and not cash the mere fact that the value placed on it is excessive, where the valuation is made in good faith, will not render the limited partner liable as a general partner.[45] As an illustration (to be varied according to the statute of any particular state where the question arises), some Ohio

St. 309, 33 Atl. 103; Haddock v. Grinnell Mfg. Corp., 109 Pa. St. 372, 1 Atl. 174; Richardson v. Hogg, 38 Pa. St. 153; Spencer Optical Mfg. Co. v. Johnson, 53 S. Car. 533, 31 S. E. 392; McArthur v. Chase, 13 Grat. (Va.) 683.

[41] Holliday v. Union Bag &c. Co., 3 Colo. 342; Wilson v. Bean, 33 Ill. App. 529; Blumenthal v. Whitaker, 170 Pa. St. 309, 33 Atl. 103; Haslet v. Kent, 160 Pa. St. 85, 28 Atl. 501; Cock v. Bailey, 146 Pa. St. 328, 23 Atl. 370; Vandike v. Rosskam, 67 Pa. St. 330.

[42] Gearing v. Carroll, 151 Pa. St. 79, 24 Atl. 1045; Sheble v. Strong, 128 Pa. St. 315, 18 Atl. 397; Maloney v. Bruce, 94 Pa. St. 249; Siegel v. Wood, 3 Pa. Dist. 463.

[43] R. S. Oglesby Co. v. Lindsey, 112 Va. 767, 72 S. E. 672, Ann. Cas. 1913 B, 913n.

[44] Abendroth v. Van Dolsen, 131 U. S. 66, 33 L. ed. 57, 9 Sup. Ct. 619; Holliday v. Union Bag &c. Co., 3 Colo. 342; Wilson v. Bean, 33 Ill. App. 529; Haggerty v. Foster, 103 Mass. 17; Pierce v. Bryant, 5 Allen (Mass.) 91; Hogan v. Hadzsits, 113 Mich. 568, 71 N. W. 1092; Buck v. Alley, 145 N. Y. 488, 40 N. E. 236; White v. Eiseman, 134 N. Y. 101, 31 N. E. 276; Sharp v. Hutchinson, 100 N. Y. 533, 3 N. E. 500; Van Ingen v. Whitman, 62 N. Y. 513; Beers v. Reynolds, 12 Barb. (N. Y.) 288; Haviland v. Chace, 39 Barb. (N. Y.) 283; Fulmer v. Abendroth, 40 Hun 639, 2 N. Y. St. 123; Reitzel v. Haines, 170 Pa. St. 306, 33 Atl. 103; Fourth St. Nat. Bank v. Whitaker, 170 Pa. St. 297, 33 Atl. 100; Van Horn v. Corcoran, 127 Pa. St. 255, 18 Atl. 16; Hite Natural Gas Co.'s Appeal, 118 Pa. St. 436, 12 Atl. 267; Eliot v. Himrod, 108 Pa. St. 569; Singer v. Kelly, 44 Pa. St. 145; Hite Nat. Gas Co.'s Appeal, 118 Pa. St. 436, 12 Atl. 267, 10 Cent. Rep. 805; McArthur v. Chase, 13 Grat. (Va.) 683; Watts v. Taft, 16 U. C. Q. B. 256.

[45] Rehfuss v. Moore, 134 Pa. St. 462, 19 Atl. 756, 7 L. R. A. 663. See also Cock v. Bailey, 146 Pa. St. 328, 23 Atl. 370; Sheble v. Strong, 128 Pa. St. 315, 18 Atl. 397.

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statutes relating to limited partnership certificates are here given: Ohio Code, section 8038: "The persons forming such (limited) partnership shall make and severally sign a certificate, which must contain: (1) The name or firm under which the partnership is to be conducted; (2) the names and respective places of residence of all the partners, distinguishing who are general and who are special partners; (3) the amount of capital which each special partner has contributed to the common stock; (4) the general nature of the business to be transacted; and (5) when the partnership is to commence and when it is to terminate." Section 8039: "Such certificate shall be acknowledged before an officer authorized to take acknowledgment of deeds. When either of the partners resides out of this state, the certificate may be acknowledged by such partner before a justice of the peace, or judge of any of the courts of the state or territory where he resides. Such acknowledgment shall be certified by the officer taking it." Section 8040: "The certificate so acknowledged shall be recorded by the recorder of the county in which the principal place of the business of the partnership is situated, in a book to be kept for that purpose, open to public inspection. If the partnership has places of business in different counties, the certificate, and acknowledgment shall be recorded in like manner in the office of recorder in every such county. If a false statement is made in such certificate, all the persons interested in the partnership shall be liable, as general partners, for all its engagements." Section 8041: "The partners shall publish a copy of such certificate for six weeks immediately after it is recorded, in a newspaper printed in the county where their principal place of business is situated. A like publication shall be made in every county where the partnership has a place of business. In case such publication is not so made, the partnership shall be deemed general." Section 8042: "Such partnership shall not be deemed to be formed until such certificate has been made, acknowledged and recorded." The foregoing sections illustrate the necessity of closely following the statutes providing for the formation of limited partnerships. It

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was held in a case in South Carolina,[46] that the provision in South Carolina Revised Statutes, section 1410 (which is the same provision as in the Ohio statute above quoted), "that a certificate to form a limited partnership shall contain, inter alia, a statement of the amount of capital which each special partner has contributed to the common stock," is not substantially complied with by a statement of the aggregate sum contributed by all the special partners. The question has arisen, as to the signing of the certificate by an attorney in fact for one of the partners. An Illinois court has held that if it be permissible for a person desirous of forming a limited partnership to sign and acknowledge the necessary certificate by an attorney in fact, such acknowledgment must be accompanied by evidence showing the authority of the attorney to act.[47]

§ 1009. **Acknowledgment of certificate.**—By the statutes of most of the states the certificate before being filed must be acknowledged by those signing it or at least be witnessed, and the acknowledgment must be made before an officer authorized to take acknowledgments.[48] Where an attorney in fact signs the name of a limited partner to the certificate and acknowledges it and it is not shown that he had any authority to do so, the formation of such limited partnership is not sufficient under the statute and the partnership will be deemed to be a general one.[49]

§ 1010. **Filing and recording of certificate.**—It is very generally provided by the statutes that the certificate of partnership must be filed with a certain officer in the county (usually the officer with whom deeds are filed for record) and it has been

[46] Spencer Optical Mfg. Co. v. Johnson, 53 S. Car. 533, 31 S. E. 392.

[47] Cummings v. Hayes, 100 Ill. App. 347.

[48] Tracy v. Tuffly, 134 U. S. 206, 33 L. ed. 879, 10 Sup. Ct. 527; Walker v. Wood, 170 Ill. 463, 48 N. E. 919; Selden v. Hall, 21 Mo. App. 452; Bowen v. Argall, 24 Wend. (N. Y.) 496; Fifth Ave. Bank v. Colgate, 120 N. Y. 381, 24 N. E. 799, 8 L. R. A. 712, 4 Silv. Ct. App. 544; Haddock v. Grinnell Mfg. Corp., 109 Pa. St. 372, 1 Atl. 174; Ussery v. Crusman (Tenn.), 47 S. W. 567.

[49] Walker v. Wood, 170 Ill. 463, 48 N. E. 919.

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held that the statute requiring this to be done is mandatory and that a full compliance with the provisions of the statute constitutes a condition precedent to the creation of a limited partnership.[50] The certificate after being executed, acknowledged and filed must be recorded and a failure to do so will make the partnership a general one. It is therefore incumbent on a limited partner to see to it that a proper record is made,[51] but when the certificate is left in the hands of the recorder or officer with whom it is required to be filed and recorded, the failure of the officer to record it will not affect the rights of the partners, for the articles will be assumed to be recorded.[52] Still it is held incumbent upon a limited partner to show that each step required to be taken has been taken in order that he may avoid liability to third persons as a general partner, and where the statute requires an index to be made showing where the recorded certificate may be found such index must be made.[53]

§ 1011. Affidavit of payment of contribution of limited partner.—Generally it is provided by the statutes that an affidavit of one or more of the general partners be made and filed with the certificate of partnership showing that the contributions of the limited members have been paid in cash or in other property of an ascertained value, where the statute permits payment in property, and while these affidavits are not required to follow the language of the statute they must contain in substance all the requirements named in the statute, for a failure of substantial compliance with the requirements will render all the partners

[50] Manhattan Co. v. Laimbeer, 17 Abb. N. Cas. 123, 53 N. Y. Super. Ct. 22.

[51] Tracy v. Tuffly, 134 U. S. 206, 33 L. ed. 879, 10 Sup. Ct. 527; Henkel v. Heyman, 91 Ill. 96; Pfirmann v. Henkel, 1 Ill. App. 145; Rayne v. Terrell, 33 La. Ann. 812; Nichols v. Buell, 157 Mich. 609, 122 N. W. 217; Gray v. Gibson, 6 Mich. 300; Fifth Ave. Bank v. Colgate, 120 N. Y. 381, 24 N. E. 799, 8 L. R. A. 712, 4 Silv. Ct. App. 544; Sheble v. Strong, 128 Pa. St. 315, 18 Atl. 397.

[52] Henkel v. Heyman, 91 Ill. 96; Manhattan Co. v. Laimbeer, 21 Abb. N. Cas. 27, 108 N. Y. 578, 15 N. E. 712. But see Gray v. Gibson, 6 Mich. 300.

[53] R. S. Oglesby Co. v. Lindsey, 112 Va. 767, 72 S. E. 672, Ann. Cas. 1913 B, 913n.

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liable as general partners.[54] Where an affidavit is false as to the capital of a limited partnership, the special partner will be held liable as a general partner in most of the states.[55] Where the required affidavit purports to have been made by an attorney in fact for a partner and no authority is shown authorizing him to make such affidavit, it will not be a compliance with the statute and such partnership will be a general one with unlimited liability.[56] Under the New York statute providing that when the certificate of a limited partnership shall be filed, an affidavit by one or more of the general partners shall be filed in the same office, stating that "the sums specified in the certificate to have been contributed by each of the limited partners to the common stock, have been actually and in good faith paid in cash," and that "if any false statement be made in such * * * affidavit, all the persons interested in such partnership shall be liable for all the engagements thereof as general partners," it was held that a statement in the affidavit that the amount stated in the certificate to have been contributed by a limited partner had been paid in at the time the affidavit was filed, on which day the partnership commenced, whereas it was not paid in until a week later, rendered the limited partner liable generally.[57] Under different state statutes, the question may arise as to what constitutes payment of the special partner's contribution. Under the Michigan act, requiring the filing of an affidavit stating that the amount of a

[54] Abendroth v. Van Dolsen, 131 U. S. 66, 33 L. ed. 57, 9 Sup. Ct. 619; Crouch v. First Nat. Bank, 156 Ill. 342, 40 N. E. 974; Hutchins v. Page, 204 Mass. 284, 90 N. E. 565, 134 Am. St. 656; Buck v. Alley, 145 N. Y. 488, 40 N. E. 236; Loomis v. Hoyt, 52 N. Y. Super. Ct. 287; Reitzel v. Haines, 170 Pa. St. 306, 33 Atl. 103; R. S. Oglesby Co. v. Lindsey, 112 Va. 767, 72 S. E. 672, Ann. Cas. 1913 B, 913n. If any one of the limited partners has failed to comply with the statute and pay in his contribution to the partnership and the affidavit states that all contributions have been paid, it is a false affidavit, and all the members of the partnership become general partners, including limited members who have complied with the statute. Whittemore v. Macdonnell, 6 U. C. C. P. 547.

[55] Myers v. Edison General Electric Co., 59 N. J. L. 153, 35 Atl. 1069; Maginn v. Lawrence, 45 N. Y. Super. Ct. 235; Fulmer v. Abendroth, 40 Hun 639, 2 N. Y. St. 123.

[56] Walker v. Wood, 170 Ill. 463, 48 N. E. 919.

[57] Myers v. Edison General Electric Co., 59 N. J. L. 153, 35 Atl. 1069.

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special or limited partner's contribution to the capital stock as shown by the certificate of partnership has been actually and in good faith contributed, in money or property at cash value, a check given to the firm, which was good when delivered, and paid on presentation, and which could be presented at any time, constitutes a contribution of cash and justifies an affidavit that such contribution had been made in good faith, though the check was not presented for payment until afterward.[58]

§ 1012. **Publication of notice.**—After the certificate is properly recorded the statutes require that a notice containing its substance shall be published in a local paper of general circulation for a designated period of time.[59] It was held in a case in North Carolina,[60] that under Code, section 3096 (which is practically the same provision as is found in New York, Ohio, and other states), providing that the terms of a limited partnership must be published, immediately after its formation, for six weeks, in some newspaper of the county, or near the place of the partnership business, or the partnership shall be deemed general, a special partner, to escape general liability, must show such publication. The notice published must be substantially in accord with the provisions of the certificate, for the publication of the notice is intended to inform the public as to the nature of the business to be conducted by the partnership, and as to who constitutes the firm and what property or cash has been contributed by the limited members of the partnership.[61]

§ 1013. **Alteration of certificate prohibited.**—The recorded certificate of a limited partnership, together with its publication,

[58] Chick v. Robinson, 95 Fed. 619, 37 C. C. A. 205, 52 L. R. A. 833.

[59] Tracy v. Tuffly, 134 U. S. 206, 33 L. ed. 879, 10 Sup. Ct. 527; Pierce v. Bryant, 5 Allen (Mass.) 91; Manhattan Co. v. Phillips, 109 N. Y. 383, 17 N. E. 129; Madison County Bank v. Gould, 5 Hill (N. Y.) 309; Davis v. Sanderlin, 119 N. Car. 84, 25 S. E. 815; Carter-Battle Grocer Co. v. Jackson, 18 Tex. Civ. App. 353, 45 S. W. 615.

[60] Davis v. Sanderlin, 119 N. Car. 84, 25 S. E. 815.

[61] Argall v. Smith, 3 Denio (N. Y.) 435; Manhattan Co. v. Phillips, 109 N. Y. 383, 17 N. E. 129; Metropolitan Nat. Bank v. Sirret, 97 N. Y. 320, 15 Abb. N. Cas. 318.

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is intended to represent to the public the facts as to the nature of the business in which the firm is engaged, its capital, its name and its membership and place of business, and in the absence of a statutory permission any alteration in the nature of its business, its capital, name, membership or place of business will have the effect of dissolving the partnership.[62] However, in some states the statutes permit the partnership to take in new members and additional capital and permit one partner to sell and transfer his interest in the partnership without causing its dissolution.[63]

§ 1014. Commencement and termination.—No limited partnership is formed until all the requirements of the statute authorizing its formation have been complied with, and if it attempts to transact any business prior to complying with all of such requirements, it will be held to do so as a general partnership and those intending to be only limited partners find themselves liable as general partners.[64] Where the members of a limited partnership have taken every step required by the statute to complete the formation of the partnership, and where the papers have gone out of their hands into the hands of the recorder for

[62] Tracy v. Tuffly, 134 U. S. 206, 33 L. ed. 879, 10 Sup. Ct. 527; Buck v. Alley, 145 N. Y. 488, 40 N. E. 236; Walkenshaw v. Perzel, 27 N. Y. Super. Ct. 426, 32 How. Pr. (N. Y.) 233; Hardt v. Levy, 72 Hun 225, 25 N. Y. S. 248, 55 N. Y. St. 706; Outcalt v. Burnet, 1 Handy (Ohio) 404, 12 Ohio Dec. 207; Singer v. Kelly, 44 Pa. St. 145.

[63] See statutes of state in question.

[64] Fox v. Graham, How. N. P. (Mich.) 90; Gray v. Gibson, 6 Mich. 300; Smith v. Warden, 86 Mo. 382; White v. Eiseman, 134 N. Y. 101, 31 N. E. 276; Rosenberg v. Block, 50 N. Y. Super. Ct. 357; Hinds v. Battin, 163 Pa. St. 487, 30 Atl. 164; Sheble v. Strong, 128 Pa. St. 315, 18 Atl. 397; Vanhorn v. Corcoran, 127 Pa. St. 255, 18 Atl. 16, 4 L. R. A. 386; Stringfellow v. Wise (Va.), 27 S. E. 432. Where there is a mistake in the published notice of the filing of a certificate as to the time when such partnership will begin, and it is stated that it was to commence on November 16, instead of October 16, it was held that if the contract in suit had been made before November 16, all the parties would be liable as general partners. The judge said, "If this contract had been made before the time mentioned in said notice for the commencement of the partnership had arrived, the objection would be fatal." Madison County Bank v. Gould, 5 Hill (N. Y.) 309. See also Levy v. Lock, 47 How. Pr. (N. Y.) 394; Van Riper v. Poppenhausen, 43 N. Y. 68; Andrews v. Schott, 10 Pa. St. 47.

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record, they will be deemed to have complied with the law and a failure of the officer to actually record the certificate will not render the partnership a general one, for the record will be assumed to be made when the certificate is put in the hands of the officer for record.[65] The certificate necessary to the formation of a limited partnership must contain a statement of the time when the partnership will begin to transact business and also when the partnership will terminate.[66] If it continues to conduct its business after the expiration of the period for which it was formed it becomes a general partnership without limitation of liability.[67]

§ 1015. Contribution of limited partner.—While a general partner in a limited partnership is only required to furnish his labor and services and to submit to unlimited liability for the partnership debts, the limited partner must contribute some portion of the capital of the partnership and his contribution becomes property which may be looked to by persons transacting business with the firm.[68] The contribution is for the benefit of creditors of the firm who have a right to assume that it has been paid in, and where it is not in good faith paid in compliance with the statute, in most of the states such failure will render a limited partner liable for the obligations of the firm the same as are the general partners, and if one limited partner fails to pay in his contribution all other limited partners, even where they have made their contributions in good faith also become liable as general partners.[69] In some states the statutes provide that where a

[65] Henkel v. Heyman, 91 Ill. 96; Manhattan Co. v. Laimbeer, 21 Abb. N. Cas. 27, 108 N. Y. 578, 15 N. E. 712.

[66] Tracy v. Tuffly, 134 U. S. 206, 33 L. ed. 879, 10 Sup. Ct. 527; Selden v. Hall, 21 Mo. App. 452; Madison County Bank v. Gould, 5 Hill (N. Y.) 309; Blumenthal v. Whitaker, 170 Pa. St. 309, 33 Atl. 103.

[67] Bailey v. Hornthal, 154 N. Y. 648, 49 N. E. 56, 61 Am. St. 645.

[68] Bowen v. Argall, 24 Wend. (N. Y.) 496; Madison County Bank v. Gould, 5 Hill (N. Y.) 309; Van Ingen v. Whitman, 62 N. Y. 513; Smith v. Argall, 6 Hill (N. Y.) 479; Hardt v. Levy, 72 Hun 225, 25 N. Y. S. 248, 55 N. Y. St. 706.

[69] Abendroth v. Van Dolsen, 131 U. S. 66, 33 L. ed. 57, 9 Sup. Ct. 619; In re Merrill, 12 Blatchf. (U. S.) 221, Fed. Cas. No. 9467; Holliday v. Union Bag &c. Co., 3 Colo. 342; Line-

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limited partner fails to make his contribution, he may be compelled to pay the same in for the benefit of creditors, but is not held liable for more than that.[70]

§ 1016. Kind of property contributed.—Where the statutes of a state require a limited partner to make his contribution in cash it can not be made in any other way, and even if he should turn over to the partnership property worth more than the cash required it will not be a compliance with the statute and he will be liable as a general partner.[71] It is held in some states that the limited partner's contribution may be made by check where the check is good and made in good faith and is paid,[72] but in jurisdictions where the contributions are allowed to be made in property other than cash, the property must be turned over at a certain cash value and in some states the property contributed must be appraised, and where this step is required and not complied with the limited partner becomes liable as a general partner.[73] To comply with the statute the contribution of a limited partner

weaver v. Slagle, 64 Md. 465, 54 Am. Rep. 775; Pierce v. Bryant, 5 Allen (Mass.) 91; Hotopp v. Huber, 160 N. Y. 524; Patterson v. Youngs, 72 Misc. 91, 129 N. Y. S. 673; Robinson v. McIntosh, 3 E. D. Smith (N. Y.) 221; Lee v. Burnley, 195 Pa. St. 58, 45 Atl. 668; Hill v. Stetler, 127 Pa. St. 145, 10 Sad. 90, 13 Atl. 306, 17 Atl. 887; Patterson v. Holland, 7 Grant Ch. (U. C.) 1. The liability of a limited partner when for any cause he becomes a general partner exists even after his death and his estate may be forced to discharge it. First Nat. Bank v. Huber, 75 Hun 80, 26 N. Y. S. 961, 58 N. Y. St. 158.

[70] De Lizardi v. Gossett, 1 La. Ann. 138; Bodey v. Cooper, 82 Md. 625, 34 Atl. 362; Deckert v. Chesapeake &c. Co., 101 Va. 804, 45 S. E. 799.

[71] In re Merrill, 12 Blatchf. (U. S.) 221, Fed. Cas. No. 9467; Lineweaver v. Slagle, 64 Md. 465, 54 Am. Rep. 775; Haggerty v. Foster, 103 Mass. 17; Pierce v. Bryant, 5 Allen (Mass.) 91; Maginn v. Lawrence, 45 N. Y. Super. Ct. 235; White v. Eiseman, 134 N. Y. 101, 31 N. E. 276; Metropolitan Nat. Bank v. Sirret, 97 N. Y. 320, 15 Abb. N. Cas. 318; Durant v. Abendroth, 69 N. Y. 148, 25 Am. Rep. 158; Van Ingen v. Whitman, 62 N. Y. 513; Hill v. Stetler, 127 Pa. St. 145, 10 Sad. (Pa.) 90, 13 Atl. 306, 17 Atl. 887; Richardson v. Hogg, 38 Pa. St. 153.

[72] Chick v. Robinson, 95 Fed. 619, 37 C. C. A. 205, 52 L. R. A. 833.

[73] Blumenthal v. Whitaker, 170 Pa. St. 309, 33 Atl. 103; Vandike v. Rosskam, 67 Pa. St. 330; Reynolds v. Creveling, 4 Pa. Dist. 419; Siegel v. Wood, 3 Pa. Dist. 463; Rehfuss v. Moore, 26 Wkly. N. Cas. (Pa.) 105

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must be made in good faith and unconditionally and must be placed in the hands of the general partners and entirely out of and beyond the control of the contributor.[74] Whether a contribution has been paid in good faith or only paid conditionally is under proper issues formed a question of fact for the jury to determine.[75] His contribution must be made in good faith, for if it is made under arrangements with the general partners by which it is to be handed back to him after the partnership is formed he will become a general partner and will not be within the statute aimed to protect limited partners from general liability.[76]

§ 1017. **Infant as partner.**—One who is an infant may be a limited partner,[78] and the fact that one of the general partners is an infant, where it does not appear that he has attempted to avoid his obligations as a partner because of his infancy, will not have the effect to make the limited partners liable as general partners.[79]

§ 1018. **Use of the word "limited," etc.**—It is provided by the statutes of some of the states that the word "limited" shall be used following the last word of the firm name, and the courts have held that an abbreviation of the word will suffice,[80] and in some states the words "and Company" or "and Co." are prohibited as a part of the firm name.[81] In other states the use of such

[74] Lineweaver v. Slagle, 64 Md. 465, 54 Am. Rep. 775; Madison County Bank v. Gould, 5 Hill (N. Y.) 309.

[75] Manhattan Co. v. Phillips, 109 N. Y. 383, 17 N. E. 129; Becker v. Koch, 104 N. Y. 394, 10 N. E. 701, 58 Am. Rep. 515; Metropolitan Nat. Bank v. Sirret, 97 N. Y. 320, 15 Abb. N. Cas. 318; Metropolitan Nat. Bank v. Palmer, 56 Hun 641, 9 N. Y. S. 239, 30 N. Y. St. 509; Hanover Nat. Bank v. Sirret, 15 Abb. N. Cas. (N. Y.) 334.

[76] In re Thayer. Fed. Cas. No. 13867, 7 Am. L. Rev. 177; Hotopp v. Huber, 160 N. Y. 524; Metropolitan Nat. Bank v. Sirret, 97 N. Y. 320, 15 Abb. N. Cas. 318; Lawrence v. Merrifield, 42 N. Y. Super, Ct. 36.

[78] Jonau v. Blanchard, 2 Rob. (La.) 513.

[79] Continental Nat. Bank v. Strauss, 137 N. Y. 553, 32 N. E. 1066.

[80] Barnard & Leas Mfg. Co. v. Packard, 28 U. S. App. 84, 64 Fed. 309; Sellersville Nat. Bank v. Banks, 9 Pa. County Ct. 92.

[81] Tracy v. Tuffly, 134 U. S. 206, 33 L. ed. 879, 10 Sup. Ct. 527; Marshall v. Lambeth, 7 Rob. (La.) 471; Ward v. Newell, 42 Barb. (N. Y.) 482, 28 How. Pr. 102; Hogg v. Or-

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words as a part of the partnership name is allowed and even required.[82]

§ 1019. **Firm name and sign.**—Every limited partnership certificate must designate the name under which the partnership when formed will conduct its business;[83] but only the names of the general partners or some of them are permitted to appear in the partnership name;[84] and in the absence of a statute permitting it, if the name of a limited partner forms a part of the firm name with his consent or knowledge, it has been held that he will become liable as a general partner.[85] However, this is not true where the statute authorizes the name of a limited partner to be used as a part of the firm name.[86] In some jurisdictions the statutes provide that a sign shall be placed in a conspicuous place in front of the partnership place of business and on it shall be transcribed the names of all the partners, designating who are general and who are limited partners.[87] Where the statute requires it the sign of the firm, on which the names of the partners must appear, must be placed in a conspicuous place in front of the firm's place of business and it is held that

gill, 34 Pa. St. 344; Andrews v. Schott, 10 Pa. St. 47; Vilas Bank v. Bullock, 10 Phila. (Pa.) 309.

[82] Hubbard v. Morgan, Fed. Cas. No. 6817; Buck v. Alley, 145 N. Y. 488, 40 N. E. 236.

[83] Tracy v. Tuffly, 134 U. S. 206, 33 L. ed. 879, 10 Sup. Ct. 527; Pfirmann v. Henkel, 1 Ill. App. 145; Hardt v. Levy, 72 Hun 225, 55 N. Y. St. 706, 25 N. Y. S. 248; Fifth Ave. Bank v. Colgate, 120 N. Y. 381, 24 N. E. 799, 8 L. R. A. 712, 4 Silv. Ct. App. 544; Blumenthal v. Whitaker, 170 Pa. St. 309, 33 Atl. 103; Hogg v. Argill, 34 Pa. St. 344; Ussery v. Crusman (Tenn.), 47 S. W. 567; Whittemore v. Macdonnell, 6 U. C. C. P. 547.

[84] Tracy v. Tuffly, 134 U. S. 206, 33 L. ed. 879, 10 Sup. Ct. 527; Spalding v. Black, 22 Kans. 55; Andrews v. Schott, 10 Pa. St. 47; Vilas Bank v. Bullock, 10 Phila. (Pa.) 309.

[85] Tracy v. Tuffly, 134 U. S. 206, 33 L. ed. 879, 10 Sup. Ct. 527; Groves v. Wilson, 168 Mass. 370, 47 N. E. 100; Buck v. Alley, 145 N. Y. 488, 40 N. E. 236; Van Ingen v. Whitman, 62 N. Y. 513; Andrews v. Schott, 10 Pa. St. 47; Ussery v. Crusman (Tenn.), 47 S. W. 567.

[86] Groves v. Wilson, 168 Mass. 370, 47 N. E. 100; Buck v. Alley, 145 N. Y. 488, 40 N. E. 236.

[87] Rotchild v. Hoge, 43 Fed. 97; Buck v. Alley, 145 N. Y. 488, 40 N. E. 236; Gearing v. Carroll, 151 Pa. St. 79, 24 Atl. 1045; Vandike v. Rosskam, 67 Pa. St. 330; Vilas Bank v. Bullock, 10 Phila. (Pa.) 309; Virginia Code 1904, § 2871.

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"conspicuous" means plain to the eye and easily to be seen.[88] Restrictions are placed upon the firm name in order that persons dealing with the firm may not be misled thereby. Massachusetts courts have construed its Public Statutes, chapter 75, section 3, making a special partner generally liable if his name is used in the firm name, as not applying where a limited partnership succeeds to a general partnership composed of the same persons, and the new partnership retains, as authorized by Statute 1887, chapter 248, section 1, the name of the old partnership, which contained that of one who is a limited partner in the new partnership.[89]

§ 1020. Liability of partners on contracts.—The liability of a general partner in a limited partnership is just the same as his liability would be if it were a general and not a limited partnership;[90] but as to the liability of a limited partner, ordinarily, compliance with the statutory requirements exempts him from liability on firm contracts in excess of the amount required to be contributed by him,[91] but where material requirements of the statute have not been complied with, a limited partner will lose the protection of the statute and his liability will be the same as

[88] R. S. Oglesby Co. v. Lindsey, 112 Va. 767, 72 S. E. 672, Ann. Cas. 1913 B, 913n.

[89] Groves v. Wilson, 168 Mass. 370, 47 N. E. 100.

[90] Emery v. Kalamazoo &c. Constr. Co., 132 Mich. 560, 94 N. W. 19; Van Dolsen v. Abendroth, 1 N. Y. City Ct. R. 469.

[91] In re Merrill, 12 Blatchf. (U. S.) 221, Fed. Cas. No. 9467; Tracy v. Tuffly, 134 U. S. 206, 33 L. ed. 879, 10 Sup. Ct. 527; Webster v. Lanum, 137 Fed. 376, 70 C. C. A. 56; Clapp v. Lacey, 35 Conn. 463; Richardson v. Carlton, 109 Iowa 515, 80 N. W. 532; Spalding v. Black, 22 Kans. 55; Burt v. Laplace, 114 La. 489, 38 So. 429; Ulman v. Briggs, 32 La. Ann. 655; Lachomette v. Thomas, 5 Rob. (La.) 172; Safe-Deposit &c. Co. v. Cahn, 102 Md. 530, 62 Atl. 819; Snyder v. Leland, 127 Mass. 291; Jaffe v. Krum, 88 Mo. 669; George v. Grant, 97 N. Y. 262; Van Riper v. Poppenhausen, 43 N. Y. 68; Levy v. Lock, 5 Daly (N. Y.) 46, 47 How. Pr. 394; Jacquin v. Buisson, 11 How. Pr. (N. Y.) 385; Madison County Bank v. Gould, 5 Hill (N. Y.) 309; Bell v. Merrifield, 28 Hun (N. Y.) 219; First Nat. Bank v. Whitney, 4 Lans. (N. Y.) 34; Singer v. Kelly, 44 Pa. St. 145; California Civ. Code, § 2501; Whittemore v. Macdonnell, 6 U. C. C. P. 547; Patterson v. Holland, 7 Grant Ch. (U. C.) 1. Compare In re Dunn, 115 La. 1084, 40 So. 466.

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a general partner.[92] This must not be construed to mean that the limited partner on that account becomes a general one; the noncompliance does not necessarily change his status, but only enlarges his liability.[93] As far as the partners themselves are concerned, they remain bound by the terms of the articles of

[92] Abendroth v. Van Dolsen, 131 U. S. 66, 33 L. ed. 57, 9 Sup. Ct. 619; In re Thayer, Fed. Cas. No. 13867, 7 Am. L. Rev. 177; McGehee v. Powell, 8 Ala. 827; Crouch v. First Nat. Bank, 156 Ill. 342, 40 N. E. 974; Adam v. Musson, 37 Ill. App. 501; Columbia Land &c. Co. v. Daly, 46 Kans. 504, 26 Pac. 1042; Rayne v. Terrell, 33 La. Ann. 812; Lineweaver v. Slagle, 64 Md. 465, 2 Atl. 693, 54 Am. Rep. 775; Groves v. Wilson, 168 Mass. 370, 47 N. E. 100; Farnsworth v. Boardman, 131 Mass. 115; Locke v. Lewis, 124 Mass. 1, 26 Am. Rep. 631, L. R. A. 1915 A, 738; Pierce v. Bryant, 5 Allen (Mass.) 91; Lancaster v. Choate, 5 Allen (Mass.) 530; Sarmiento v. The Catherine Co., 110 Mich. 120, 67 N. W. 1085; Fox v. Graham, Howell N. P. (Mich.) 90; In re Allen, 41 Minn. 430, 43 N. W. 382; Perth Amboy Mfg. Co. v. Condit, 21 N. J. L. 659; Buck v. Alley, 145 N. Y. 488, 40 N. E. 236; Fifth Ave. Bank v. Colgate, 120 N. Y. 381, 24 N. E. 799, 8 L. R. A. 712, 4 Silv. Ct. App. 544; Manhattan Co. v. Laimbeer, 108 N. Y. 578, 15 N. E. 712; Beers v. Reynolds, 11 N. Y. 97; Van Ingen v. Whitman, 62 N. Y. 513; Hartford Nat. Bank v. Beinecke, 80 App. Div. (N. Y.) 546, 80 N. Y. S. 803; Haviland v. Chace, 39 Barb. (N. Y.) 283; Bell v. Merrifield, 28 Hun (N. Y.) 219; Metropolitan Nat. Bank v. Palmer, 56 Hun 641, 30 N. Y. St. 509, 9 N. Y. S. 239; First Nat. Bank v. Huber, 75 Hun (N. Y.) 80, 58 N. Y. St. 158, 26 N. Y. S. 961; Loomis v. Hoyt, 52 N. Y. Super. Ct. 287; Outcalt v. Burnet, 1 Handy (Ohio) 404, 12 Ohio Dec. 207; Lee v. Burnley, 195 Pa. St. 58, 45 Atl. 668; Fourth St. Nat. Bank v. Whitaker, 170 Pa. St. 297, 33 Atl. 100; Haslet v. Kent, 160 Pa. St. 85, 28 Atl. 501; Cock v. Bailey, 146 Pa. St. 328, 23 Atl. 370; Sheble v. Strong, 128 Pa. St. 315, 18 Atl. 397; Vanhorn v. Corcoran, 127 Pa. St. 255, 18 Atl. 16, 4 L. R. A. 386; Haddock v. Grinnell Mfg. Corp., 109 Pa. St. 372, 1 Atl. 174; Guillou v. Peterson, 89 Pa. St. 163; Vandike v. Rosskam, 67 Pa. St. 330; Hogg v. Orgill, 34 Pa. St. 344; Chatham Nat. Bank v. Gardner, 31 Pa. Super. Ct. 135; Abington Dairy Co. v. Reynolds, 24 Pa. Super. Ct. 632; Hill v. Stetler, 127 Pa. St. 145, 10 Sad. (Pa.) 90, 13 Atl. 306, 17 Atl. 887; Bergner &c. Brew Co. v. Cobb, 12 Pa. Co. Ct. 460; Savage v. Carney (Tenn. Ch.), 47 S. W. 571; Benedict v. Van Allen, 17 U. C. Q. B. 234; Patterson v. Holland, 7 Grant Ch. (U. C.) 1. Compare Rothchild v. Hoge, 43 Fed. 97; De Lizardi v. Gossett, 1 La. Ann. 138; Deckert v. Chesapeake Western Co., 101 Va. 804, 45 S. E. 799.

[93] Abendroth v. Van Dolsen, 131 U. S. 66, 33 L. ed. 57, 9 Sup. Ct. 619. But see Hutchins v. Page, 204 Mass. 284, 90 N. E. 565, 134 Am. St. 656.

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association.[94] But it has been held that the purchaser of the interest of a limited partner in a firm, all of whose members were, through failure to comply with the statutes, liable as general partners, became himself thus liable, even in the absence of all intention on his part to incur such liability.[95]

§ 1021. **Effect of non-compliance with statute.**—Where the formation of a limited partnership is attempted and the statutes governing are not fully complied with, the limited partners become liable as general partners.[96] But on the question as to whether there has been a compliance with the statute, and the limited partner been thereby relieved from general liability, it has been held that it is immaterial that such limited partner has lost all the money he put into the concern, and has never received any dividends from the business.[97] Moreover, it has been held that where the statutes providing for the creation of limited partnerships have not been followed, inequality of interest in the firm does not affect the rights of partnership creditors in the matter of the enforcement of their claims.[98] While by noncompliance with the statute in the organization of a limited partnership or by his conduct, a limited partner as to third persons dealing with the firm, may become liable as a general partner, his liability as between himself and partners is not changed, for it must be determined by the partnership agreement entered into by all the partners.

§ 1022. **Estoppel.**—Where a limited partner represents himself to be a general partner he will be bound as such and will be held estopped from asserting that he is a limited partner.[99] The law apparently penalizes the act of a limited part-

[94] Waters v. Harris, 60 N. Y. Super. Ct. 192, 28 Abb. N. C. 89, 43 N. Y. St. 62, 17 N. Y. S. 370.

[95] Strang v. Thomas, 114 Wis. 599, 91 N. W. 237.

[96] Manhattan Brass Co. v. Allin, 35 Ill. App. 336; Haslet v. Kent, 160 Pa. St. 85, 28 Atl. 501; Gearing v. Carroll, 151 Pa. St. 79, 24 Atl. 1045.

[97] R. S. Oglesby Co. v. Lindsey, 112 Va. 767, 72 S. E. 672, Ann. Cas. 1913 B, 913n.

[98] Peabody v. Oleson, 15 Colo. App. 346, 62 Pac. 234; Lancaster v. Choate, 5 Allen (Mass.) 530.

[99] Barrows v. Downs, 9 R. I. 446,

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ner in representing himself as a general partner by rendering him liable as such.[1] A partner may be estopped from claiming that the partnership was not legally formed and where the rights of third persons are not involved in a controversy between the partners themselves the members are estopped from asserting that the limited partnership is not valid because of the statutes not having been followed and hence that the limited members are liable as general partners.[2] While it is held in some states that persons dealing with a firm as a limited partnership will not be permitted to deny the validity of the formation of the partnership,[3] it is generally held that persons not members of the firm who have not induced the partners to conduct their business in an irregular manner, or have not actually agreed to the limited liability of a partner, are generally not held estopped from asserting that all the partners are liable as general partners.[4] Under the statutes of most of the states if a limited partner assists in or has anything to do with the conduct or management of the partnership business or acts as agent of the firm he will lose the protection by the statute and become liable as a general partner. But it has been held that a limited partner does "not transact any partnership business, nor act as agent for that purpose," by merely looking over the business, examining the books, and stating that he expected to close out the busi-

11 Am. Rep. 283; Watts v. Taft, 16 U. C. Q. B. 256.

[1] Barrows v. Downs, 9 R. I. 446, 11 Am. Rep. 283. See also Watts v. Taft, 16 U. C. Q. B. 256. Compare Marshall v. Lambeth, 7 Rob. (La.) 471; Taylor v. Rasch, 1 Flipp. (U. S.) 385, Fed. Cas. No. 13800, 11 Nat. Bank. Reg. 91.

[2] Casola v. Vasquez, 164 N. Y. 608, 58 N. E. 1085; Sturgeon v. Apollo Oil &c. Co., 203 Pa. St. 369, 53 Atl. 189. But see Hardt v. Levy, 72 Hun (N. Y.) 225, 25 N. Y. S. 248, 55 N. Y. St. 706.

[3] Tracy v. Tuffly, 134 U. S. 206, 33 L. ed. 879, 10 Sup. Ct. 527; Staver &c. Mfg. Co. v. Blake, 111 Mich. 282, 69 N. W. 308, 38 L. R. A. 798; Carhart v. Killough, 1 White & W. Tex. App. Civ. Cas., § 112.

[4] Manhattan Brass Co. v. Allin, 35 Ill. App. 336; Imperial Shale Brick Co. v. Jewett, 169 N. Y. 143, 62 N. E. 167; Benedict &c. Mfg. Co. v. Hutchinson, 1 N. Y. St. 234, 53 N. Y. Super. Ct. 486; Allegheny Nat. Bank v. Bailey, 147 Pa. St. 111, 23 Atl. 439; Sheble v. Strong, 128 Pa. St. 315, 18 Atl. 397; Hess v. Werts, 4 Serg. & R. (Pa.) 356.

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ness in order to pay creditors, at a time when the general partner is ill.[5] Moreover, the act of a limited partner in loaning money, on security or otherwise, to the firm for partnership purposes, or to enable it to carry on the business on a more extended scale, does not render him liable as a general partner under a statute imposing such liability upon the alteration of the nature of the business, capital or shares contributed.[6] It has been held that the principles of estoppel will operate to prevent persons who agree to create a limited partnership, and who conduct their business as such from asserting, one against the other, that, by reason of the fact that statutory requirements have not been literally met, a complete formation of such partnership has not been accomplished.[7] But it seems that where the remedies against the surviving partners have been exhausted, or such survivors are insolvent, recourse may be had to the estate of the deceased limited partner to whom general liability has attached.[8] While limited partners may, by their conduct, or by failure to comply with the statute in the formation of the partnership, become liable to third persons as general partners, it does not follow that they become such as to copartners for their rights as to them will be measured by the partnership contract.[9]

§ 1023. **Insolvency of partnership.**—When a limited partnership becomes insolvent, the statutes prohibit it from creating liens on its property or confessing judgments against it in order to prefer any creditor or creditors. Neither is it permitted to transfer its property.[10] Its assets under such conditions

[5] Cropper v. Illinois Sew. Mach. Co., 100 Miss. 127, 54 So. 849.

[6] Walkenshaw v. Perzel, 32 How. Pr. 233, 27 N. Y. Super. Ct. 426. See also Metropolitan Nat. Bank v. Palmer, 56 Hun 641, 30 N. Y. St. 509, 9 N. Y. S. 239.

[7] Casola v. Vasquez, 164 N. Y. 608, 58 N. E. 1085; Casola v. Kugelman, 54 N. Y. S. 89, 33 App. Div. 428.

[8] Hotopp v. Huber, 160 N. Y. 524, 55 N. E. 206. See also Richter v. Poppenhausen, 42 N. Y. 373.

[9] Lancaster v. Choate, 5 Allen (Mass.) 530.

[10] Crouch v. First Nat. Bank, 156 Ill. 342, 40 N. E. 974; Green v. Hood, 42 Ill. App. 652; Batchelder v. Altheimer, 10 Mo. App. 181. See statutes of particular state.

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become as trust funds for all the creditors.[11] When it has become insolvent or has attempted to prefer certain creditors or has transferred its property, a creditor may upon petition have a receiver appointed and in the same proceeding have such preference or transfer set aside,[12] and where the action of the partnership in transferring its property or preferring certain creditors has been agreed to by a limited partner he will become liable as a general partner.[13] Such statutes will not prevent a limited partnership from making an assignment for the benefit of all its creditors or from making a sale of all its property to a bona-fide purchaser,[14] and it may, in a proper case, permit judgment by default to be taken against it without violating such statutes.[15] It has been held that where a limited partnership is, before the expiration of its terms, dissolved by insolvency, general liability is not thereby imposed upon the limited partner.[16]

§ 1024. Assets applied to liabilities.—The property of a limited partnership may be levied upon at any time in a proper case by a judgment creditor before any receiver has been appointed whether the partnership is insolvent or not,[17] but one holding a judgment against a limited partner only can not levy on the partnership property.[18] Whether a creditor of the limited partnership who is also a limited partner can be permitted

[11] Baily v. Hornthal, 154 N. Y. 648, 49 N. E. 56, 61 Am. St. 645; George v. Grant, 97 N. Y. 262; Mattison v. Demarest, 4 Rob. (N. Y.) 161; McArthur v. Chase, 13 Grat. (Va.) 683.

[12] Crouch v. First Nat. Bank, 156 Ill. 342, 40 N. E. 974; Innes v. Lansing, 7 Paige (N. Y.) 583.

[13] Lineweaver v. Slagle, 64 Md. 465, 2 Atl. 693, 54 Am. Rep. 775; Farnsworth v. Boardman, 131 Mass. 115; Casola v. Kugelman, 33 N. Y. App. Div. 428, 54 N. Y. Suppl. 89; McArthur v. Chase, 13 Grat. (Va.) 683.

[14] Tracy v. Tuffly, 134 U. S. 206, 33 L. ed. 879, 10 Sup. Ct. 527; Schwartz v. Soutter, 103 N. Y. 683, 9 N. E. 448, 1 Silvernail Ct. App. 237; State Bank v. Blanchard, 90 Va. 22, 17 S. E. 742.

[15] Hall v. Glessner, 100 Mo. 155, 13 S. W. 349; Greene v. Breck, 32 Barb. (N. Y.) 73. But see Jackson v. Sheldon, 9 Abb. Pr. (N. Y.) 127.

[16] Continental Nat. Bank v. Strauss, 60 N. Y. Super. Ct. 151, 43 N. Y. St. 68, 17 N. Y. S. 188.

[17] Van Alstyne v. Cook, 25 N. Y. 489.

[18] Harris v. Murray, 28 N. Y. 574, 86 Am. Dec. 268.

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to share equally with other creditors of the partnership will depend upon the statutes of the state where the question arises.[19]

§ 1025. Dealings between general and limited partners.—Any dealings between a limited partner and the general partnership must be entirely fair to the partnership or they will be held to be invalid; for the interests of the limited partner can not be allowed to be enhanced because of his influence with the general partnership. The utmost good faith must be shown and the transactions be fair to the partnership or they will be declared invalid, but it has been held that the purchase by a limited partner of property pledged with the firm,[20] or of discounted claims against the latter is not ipso facto invalid.[21] Further, the limited partner's joinder in, assent to,[22] or ratification of[23] an assignment for the benefit of creditors, not authorized by the original agreement to be executed by the general partners alone,[24] appears, in general, to be necessary,[25] and such acts will not render a limited partner liable.

§ 1026. Renewal of limited partnership.—Generally the statutes authorizing the formation of limited partnerships also

[19] See the statutes of particular state. In the following cases such limited partner was allowed the same rights as other creditors. Clapp v. Lacey, 35 Conn. 463; Rayne v. Terrell, 33 La. Ann. 812; Metropolitan Nat. Bank v. Sirret, 97 N. Y. 320, 15 Abb. N. Cas. 318; Hayes v. Heyer, 35 N. Y. 326. In the following cases he was not permitted to share with other creditors. Jaffe v. Krum, 88 Mo. 669; Hayes v. Bement, 3 Sandf. (N. Y.) 394; Coffin's Appeal, 106 Pa. St. 280; Dunning's Appeal, 44 Pa. St. 150; Purdy v. Lacock, 6 Pa. St. 490.

[20] Lewis v. Graham, 4 Abb. Pr. (N. Y.) 106.

[21] Allison v. Abendroth, 108 N. Y. 470, 15 N. E. 606.

[22] Rothchild v. Hoge, 43 Fed. 97; In re Allen, 41 Minn. 430, 43 N. W. 382; Robinson v. McIntosh, 3 E. D. Smith (N. Y.) 221; Schulten v. Lord, 4 E. D. Smith (N. Y.) 206; Mills v. Argall, 6 Paige (N. Y.) 577; Deming v. Colt, 3 Sandf. (N. Y.) 284; Darrow v. Bruff, 36 How. Pr. (N. Y.) 479; Waters v. Harris, 60 N. Y. Super. Ct. 192, 28 Abb. N. C. (N. Y.) 89, 43 N. Y. St. 62, 17 N. Y. S. 370; Singer v. Kelly, 44 Pa. St. 145.

[23] Deming v. Colt, 3 Sandf. (N. Y.) 284.

[24] Mills v. Argall, 6 Paige (N. Y.) 577.

[25] Schulten v. Lord, 4 E. D. Smith (N. Y.) 206. See further Mills v. Argall, 6 Paige (N. Y.) 577; Walk-

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provide for the renewal and continuation thereof after the term for which they have been formed expires, such renewals being for a stated period of time. It is provided that a new certificate must be executed, acknowledged, recorded and published and that proof by an affidavit of a general partner shall be made and filed similar to the affidavit in the original formation of the partnership showing who are general and who are limited members and the amount contributed by each of the limited members, etc.[26] There must be just as strict compliance with the statute in the renewal certificate as in the original certificate and all the requirements of the statute must be followed or the limited members will be held to be liable as general partners,[27] and if the partnership continues to do business after the expiration of the period for which it was formed without being renewed all the partners become as general partners with unlimited liability.[28] There can be no renewal unless there is an original valid limited partnership;[29] and where there is no valid original partnership there is nothing to renew, but the partners may form a new partnership by complying with the statutes.[30] No new capital

enshaw v. Perzel, 32 How. Pr. (N. Y.) 233, 27 N. Y. Super. Ct. 426. And compare Waters v. Harris, 60 N. Y. Super. Ct. 192, 28 Abb. N. C. 89, 43 N. Y. St. 62, 17 N. Y. S. 370; Tracy v. Tuffly, 134 U. S. 206, 33 L. ed. 879, 10 Sup. Ct. 527.

[26] Hogan v. Hadzsits, 113 Mich. 568, 71 N. W. 1092; Fifth Ave. Bank v. Colgate, 120 N. Y. 381, 24 N. E. 799, 8 L. R. A. 712, 4 Silvernail Ct. App. 544; Metropolitan Nat. Bank v. Sirret, 97 N. Y. 320, 15 Abb. N. Cas. 318; First Nat. Bank v. Huber, 75 Hun (N. Y.) 80, 26 N. Y. S. 96, 58 N. Y. St. 158; Haviland v. Chace, 39 Barb. (N. Y.) 283; Fourth St. Nat. Bank v. Whitaker, 170 Pa. St. 302, 33 Atl. 100; Haddock v. Grinnell Mfg. Corp., 109 Pa. St. 372, 1 Atl. 174; Guillou v. Peterson, 89 Pa. St. 163; Fourth St. Nat. Bank v. Haines, 3 Pa. Dist. 437; Ussery v. Crusman (Tenn.), 47 S. W. 567.

[27] Durgin v. Colburn, 176 Mass. 110, 57 N. E. 213; Haddock v. Grinnell Mfg. Corp., 109 Pa. St. 372, 1 Atl. 174.

[28] Lancaster v. Choate, 5 Allen (Mass.) 530; Sarmiento v. The Catherine C., 110 Mich. 120, 67 N. W. 1085; Buck v. Alley, 145 N. Y. 488, 40 N. E. 236; Columbia Bank v. Berolzheimer, 33 N. Y. App. Div. 235, 53 N. Y. S. 417; Tindel v. Park, 154 Pa. St. 36; Guillou v. Peterson, 89 Pa. St. 163.

[29] Hardt v. Levy, 72 Hun 225, 25 N. Y. 248, 55 N. Y. St. Rep. 706; Blumenthal v. Whitaker, 170 Pa. St. 309, 33 Atl. 103.

[30] First Nat. Bank v. Huber, 75 Hun 80, 26 N. Y. S. 96, 58 N. Y. St. 158.

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is required to renew a partnership, but the capital contributed by limited partners to the original partnership must be shown to be intact and be in condition so that creditors dealing with the firm may not be deceived as to the firm's assets.[31] If false statements are made either in the original or renewal certificate, the limited members of the partnership as to persons dealing with it will be liable the same as general partners;[32] and the fact that a limited partner has no knowledge of the falseness of statements contained in the certificate will not excuse him and he will become liable as a general partner just the same as if he had made the false statements himself.[33] If a statement is made in a renewal certificate not required to be made by the statute, then its falsity will not render limited partners liable as general partners.[34]

§ 1027. Change of membership or nature of business conducted.—For the protection of persons dealing with a limited

[31] Durgin v. Colburn, 176 Mass. 110, 57 N. E. 213; Patterson v. Youngs, 154 App. Div. 536, 139 N. Y. S. 670; Patterson v. Youngs, 72 Misc. 91, 129 N. Y. S. 673; Lee v. Burnley, 195 Pa. St. 58, 45 Atl. 668; Reitzel v. Whitaker, 170 Pa. St. 306, 33 Atl. 103; Haddock v. Grinnell Mfg. Corp., 109 Pa. St. 372, 1 Atl. 174. But see Fifth Ave. Bank v. Colgate, 120 N. Y. 381, 24 N. E. 799, 8 L. R. A. 712, 4 Silvernail Ct. App. 544, where it was held that a renewal certificate and affidavit to renew a limited partnership need not state that the original capital contributed by limited members was at the date of the renewal intact, and that where such a statement is contained in the affidavit it is mere surplusage and even if untrue it would not render the limited partners liable as general partners. That the contribution must be made at the formation of the limited partnership and if made then no statement is required to be made in a renewal certificate that it is still intact. See also Fourth St. Nat. Bank v. Whitaker, 170 Pa. St. 302, 33 Atl. 100; Reitzel v. Haines, 3 Pa. Dist. 523. It was held in New York in a few cases that there might be a renewal even where the contributions of the limited partners to the original partnership were impaired. Arnold v. Danziger, 30 Fed. 898; Hardt v. Levy, 72 Hun 225, 25 N. Y. S. 248, 55 N. Y. St. 706; Fifth Ave. Bank v. Colgate, 120 N. Y. 381, 24 N. E. 799, 8 L. R. A. 712, 4 Silvernail Ct. App. 544.

[32] Hogan v. Hadzsits, 113 Mich. 568, 71 N. W. 1092; Reitzel v. Whitaker, 170 Pa. St. 306, 33 Atl. 103; Fourth St. Nat. Bank v. Whitaker, 170 Pa. St. 302, 33 Atl. 100.

[33] Fourth St. Nat. Bank v. Whitaker, 170 Pa. St. 302, 33 Atl. 100.

[34] Fifth Ave. Bank v. Colgate, 120 N. Y. 381, 24 N. E. 799, 8 L. R. A. 712, 4 Silvernail Ct. App. 544.

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partnership the statutes provide that the certificate and published notice should acquaint the public with the nature of the business the firm intends to conduct and who its members are, hence it follows that in the absence of a statute permitting it, if a change is made in the nature of the business conducted or in the membership of the partnership, the public dealing with it may be deceived, accordingly the courts hold that such an alteration will dissolve the partnership, but under the statutes of Pennsylvania it was held that one of the three shareholders of a limited partnership might transfer all his shares immediately after the partnership was organized without working a dissolution of the partnership.[35] Generally it is held that when such an alteration in membership or nature of the business conducted by the partnership takes place with the consent of a limited or special partner he will become liable as a general partner in transactions of the firm thereafter,[36] but it is held that the mere loaning of money to the partnership by a limited partner does not constitute such an alteration in the business as would make the limited partner liable as a general partner.[37] The removal of the business of the partnership to a county other than where organized has been held to be such an alteration as will render a limited partner liable as a general partner when he consents to such removal.[38] As a rule every alteration made in the nature of the business of the firm, in the names of the partners, or in any other matter specified in the original

[35] In re Globe Refining Co., 151 Pa. St. 558, 25 Atl. 128.

[36] Pierce v. Bryant, 5 Allen (Mass.) 91; Fox v. Graham, How. N. P. (Mich.) 90; Perth Amboy Mfg. Co. v. Condit, 21 N. J. L. 659; Smith v. Argall, 6 Hill (N. Y.) 479; Ames v. Downing, 1 Bradf. Sur. (N. Y.) 321; Lachaise v. Marks, 4 E. D. Smith (N. Y.) 610; Buckley v. Dingman, 11 Barb. (N. Y.) 289; Beers v. Reynolds, 11 N. Y. 97; Andrews v. Schott, 10 Pa. St. 47; Singer v. Macalester, 4 Phila. (Pa.) 312.

[37] Walkenshaw v. Perzel, 4 Rob. (N. Y.) 426, 32 How. Pr. 233; Metropolitan Nat. Bank v. Palmer, 56 Hun 641, 9 N. Y. S. 239, 30 N. Y. St. 509; Haddock v. Grinnell Mfg. Corp., 109 Pa. St. 372, 1 Atl. 174.

[38] First Nat. Bank of Galesburg v. Clark, 143 Ill. 83, 32 N. E. 255; Van Riper v. Poppenhausen, 43 N. Y. 68; Loomis v. Hoyt, 52 N. Y. Super. Ct. 287; Madison County Bank v. Gould, 5 Hill (N. Y.) 309; Singer v. Macalester, 4 Phila. (Pa.) 312; Singer v. Kelly, 44 Pa. St. 145.

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certificate, which is required by law, is deemed a dissolution of the limited partnership and converts it into a general partnership, which, if desired, can usually be again converted into a limited partnership by filing certificate and other requirements for originally forming a limited partnership.

§ 1028. Impairment of capital.—Generally the statutes prohibit the withdrawal by a limited partner of any part of the capital he has contributed and this is true whether the money is withdrawn in the form of pretended dividends or profits or any other form of deception.[39] It is not a violation of the statute for a limited partner to receive interest on profits on his investment so long as the original contribution to the capital is not impaired.[40] In some of the states the withdrawal by a limited partner of any part of his contributed capital will render him liable as a general partner,[41] while in others his liability is only to repay the cash thus withdrawn, except in cases where under the statutes such a withdrawal is an alteration of the capital of the partnership, when his liability for future debts of the firm will become that of a general partner.[42] In the somewhat recent case[43] it is held that a limited partner who has withdrawn interest on the sum contributed by him to the partnership is not liable to creditors to the amount so withdrawn

[39] Bailey v. Hornthal, 154 N. Y. 648, 49 N. E. 56, 61 Am. St. 645; Lachaise v. Marks, 4 E. D. Smith (N. Y.) 610; Coffin's Appeal, 106 Pa. St. 280; Hogg v. Orgill, 34 Pa. St. 344, where it was held that borrowing money from the partnership and repaying it was not a violation of the law.

[40] Hogan v. Hadzsits, 113 Mich. 568, 71 N. W. 1092.

[41] Durgin v. Colburn, 176 Mass. 110, 57 N. E. 213; California Civ. Code, §§ 2495, 2501; Missouri Rev. Stats. 1899, §§ 4442, 7207; Montana Civ. Code, §§ 3314, 3331; New Hampshire Pub. Laws, ch. 122, § 7; North Dakota Rev. Codes, §§ 4430, 4435; South Dakota Rev. Civ. Code, §§ 1782, 1787; Wyoming Rev. Stats., § 2504.

[42] Tracy v. Tuffly, 134 U. S. 206, 33 L. ed. 879, 10 Sup. Ct. 527; Hampden Bank v. Morgan, Fed. Cas. No. 6008; Clapp v. Lacey, 35 Conn. 463; La-Chomette v. Thomas, 1 La. Ann. 120; Hogan v. Hadzsits, 113 Mich. 568, 71 N. W. 1092; Bell v. Merrifield, 28 Hun (N. Y.) 219; Madison County Bank v. Gould, 5 Hill (N. Y.) 309; Coffin's Appeal, 106 Pa. St. 280; Singer v. Kelly, 44 Pa. St. 145.

[43] Hogan v. Hadzsits, 113 Mich. 568, 71 N. W. 1092.

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where the capital is not impaired and the assets are sufficient to pay the partnership debts.

§ 1029. **Changing general to limited partnership.**—A general partnership may be changed into a limited one,[44] but assets of the old firm can not be turned over to the new organization in place of the cash required to be contributed by a person desiring to become a limited partner.[45] In order to change an existing general partnership into a limited one substantially the same steps must be taken as are required at the formation of an original limited partnership; however, the new firm when duly organized may purchase the assets of the old general partnership and pay therefor with cash contributed by a subscribing limited member, but good faith must characterize the transaction.[46]

§ 1030. **Actions by or against partnership.**—Since the limited partners have no part in the management of the partnership's business, they are not known in the firm's litigation and so long as the partnership is a going concern all actions at law are to be brought by or against the general partners only.[47] If the limited partners have become general partners in liability because the partnership has not followed the requirements of the statute under which it was organized and is therefore not a limited partnership except in name, all partners who are liable as gen-

[44] Anderson v. Stone, 24 Ill. App. 342; Metropolitan Nat. Bank v. Sirret, 97 N. Y. 320, 15 Abb. N. Cas. 318.

[45] Van Ingen v. Whitman, 62 N. Y. 513; Maginn v. Lawrence, 45 N. Y. Super. Ct. 235; Eliot v. Himrod, 108 Pa. St. 569; Kohler v. Lindenmyer, 129 N. Y. 498, 29 N. E. 957. See also Brown v. Davis, 6 Duer (N. Y.) 549.

[46] Metropolitan Nat. Bank v. Sirret, 97 N. Y. 320, 15 Abb. N. Cas. 318; Lawrence v. Merrifield, 42 N. Y. Super Ct. 36.

[47] In re Dunn, 115 La. 1084, 40 So. 466; City Safe-Deposit &c. Co. v. Cahn, 102 Md. 530, 62 Atl. 819; Lawrence v. Batcheller, 131 Mass. 504; Perth Amboy Mfg. Co. v. Condit, 21 N. J. L. 659; Artisans' Bank v. Treadwell, 34 Barb. (N. Y.) 553; Schulten v. Lord, 4 E. D. Smith (N. Y.) 206; Richter v. Poppenhausen, 42 N. Y. 373, 9 Abb. Pr. (N. S.) 263, 57 Barb. 309, 39 How. Pr. 82; Hunt v. Joy, 1 Wkly. Notes Cas. (Pa.) 219; Wetherill v. McCloskey, 28 W. Va. 195.

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eral partners should join as plaintiffs or be made defendants;[48] and where a creditor has obtained a judgment against the general partners and then ascertained facts to show that the limited partner is liable as a general partner, he may bring his action against the limited partner.[49] Actions to settle up the affairs of the partnership and for the appointment of receivers may include limited partners as parties.[50] When in a suit on a partnership debt a defense is set up that certain of the defendants are limited partners and hence not liable, it is not incumbent upon the plaintiff to show that he has sustained any loss by the defendant's failure to comply with the law governing the creation of a limited partnership, and the fact that plaintiff had knowledge of who was claimed to be general and who limited members of the partnership at the time he became a creditor will not estop him from relying upon the illegality of the partnership's formation to overcome the defense that some of the defendants were limited partners only.[51] In such a case the only issue is as to whether the statutes under which the limited partnership was claimed to have been formed were complied with so as to avoid general liability.[52] In general, suits respecting the business of a limited partnership should be against the general partners only, except when otherwise provided by statute. In Maryland this has been interpreted as applying to suits respecting the partnership business while the firm is a going concern, and to suits after its dissolution while the special partner's cash contribution forms a part of the assets or has been absorbed in liquidating debts, but does not apply to a case when

[48] Sarmiento v. The Catherine C., 110 Mich. 120, 67 N. W. 1085; City Safe-Deposit &c. Co. v. Cahn, 102 Md. 530, 62 Atl. 819; Hotopp v. Huber, 160 N. Y. 524, 55 N. E. 206.

[49] Durant v. Abendroth, 97 N. Y. 132; McArthur v. Chase, 13 Grat. (Va.) 683.

[50] Walkenshaw v. Perzel, 32 How. Pr. (N. Y.) 233, 27 N. Y. Super. Ct. 426; Greene v. Breck, 32 Barb. (N. Y.) 73.

[51] R. S. Oglesby Co. v. Lindsey, 112 Va. 767, 72 S. E. 672, Ann. Cas. 1913 B, 913n.

[52] Patterson v. Youngs, 154 App. Div. 536, 139 N. Y. S. 670; R. S. Oglesby Co. v. Lindsey, 112 Va. 767, 72 S. E. 672, Ann. Cas. 1913 B, 913n.

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the partnership has been dissolved and the special partner has been repaid his cash contribution, leaving firm debts unpaid.[53]

§ 1031. Injunction—Receiver, pleadings and trial.—An injunction may be had against a limited partnership under the same conditions as against a general partnership. It may be had and a receiver may be named at the suit of a creditor whenever the partnership becomes insolvent or is in imminent danger of becoming insolvent.[54] The pleadings need not aver the effort and failure to form a limited partnership. It may proceed against both the general and limited partners and the plaintiff may prove under these averments that all of them are liable as general partners.[55] A limited partner who is sued as a general partner should plead by way of answer averring compliance with the statute if he desires to defend upon the validity of the formation and conduct of the limited partnership.[56] One who brings an action on an obligation of a partnership assumes the burden of establishing the existence of the partnership.[57] When he avers that a defendant partnership was organized as a limited partnership but has become a general one, or facts showing that a limited partner has become liable as a general one, he must bear the burden of proving his allegations or he can not recover. A partnership formed as a limited one will be presumed to be valid until the contrary is shown.[58]

[53] Safe-Deposit & Trust Co. v. Cahn, 102 Md. 530, 62 Atl. 819.

[54] American Box Mach. Co. v. Crosman, 61 Fed. 888, 10 C. C. A. 146; Batchelder v. Altheimer, 10 Mo. App. 181; Whitewright v. Stimpson, 2 Barb. (N. Y.) 379; Whitcomb v. Fowle, 10 Daly (N. Y.) 23, 7 Abb. N. Cas. 295, 56 How. Pr. 365; Blaylock's Appeal, 73 Pa. St. 146. See also LaChaise v. Lord, 1 Abb. Pr. (N. Y.) 213, 10 How. Pr. 461.

[55] Pierce v. Bryant, 5 Allen (Mass.) 91; Sharp v. Hutchinson, 100 N. Y. 533, 3 N. E. 500; Continental Nat. Bank v. Strauss, 60 N. Y. Super. Ct. 151, 43 N. Y. St. 68, 17 N. Y. S. 188; Merchants' &c. Bank v. Gardner, 31 Pa. Super. Ct. 143.

[56] Abendroth v. Van Dolsen, 131 U. S. 66, 33 L. ed. 57, 9 Sup. Ct. 619; Rawitzer v. Wyatt, 42 Fed. 287; Henkel v. Heyman, 91 Ill. 96; Blumenthal v. Whitaker, 170 Pa. St. 309, 33 Atl. 103; Siegel v. Wood, 3 Pa. Dist. 463.

[57] Prince v. Lamb, 128 Cal. 120, 60 Pac. 689; Fox v. Graham, How. N. P. (Mich.) 90.

[58] Booth v. Hunt, 69 Fed. 220;

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§ 1032. **Rights of creditors of limited partnership.**—When a limited partnership becomes insolvent a creditor of the firm may maintain a suit against it to wind up its business and have its assets distributed among its creditors;[59] or a member of the firm may file a suit for the same purpose and have a receiver appointed to preserve the assets and have distribution made among creditors.[60] A creditor without security may sue to set aside confessions of judgments and fraudulent conveyances;[61] and when such a suit is successful it will not give him a preference over other creditors of the firm, but will be for the benefit of all.[62] While the assets of a limited partnership constitute a fund for the benefit of creditors and the firm can not by assignment or otherwise voluntarily prefer some creditors over others, still the law will favor the diligent creditor and if he by prompt suit procures a judgment and upon sale thereunder of the partnership property collects his debt, such sale will be valid even though it has the effect of giving him a preference over other creditors. It is only voluntary preferences that are prohibited

Continental Nat. Bank v. Strauss, 137 N. Y. 553, 32 N. E. 1066; Van Ingen v. Whitman, 62 N. Y. 513. See also Madison County Bank v. Gould, 5 Hill (N. Y.) 309; Hotopp v. Huber, 160 N. Y. 524, 55 N. E. 206.

[59] Corbin v. Boies, 34 Fed. 692; Crouch v. Chicago First Nat. Bank, 156 Ill. 342, 40 N. E. 974; Batchelder v. Altheimer, 10 Mo. App. 181; Walkenshaw v. Perzel, 27 N. Y. Super. Ct. 426, 32 How. Pr. (N. Y.) 233; Van Alstyne v. Cook, 25 N. Y. 489; Artisans' Bank v. Treadwell, 34 Barb. (N. Y.) 553; Haggerty v. Taylor, 10 Paige (N. Y.) 261; Bell v. Merrifield, 28 Hun (N. Y.) 219; Continental Nat. Bank v. Strauss, 17 N. Y. S. 188, 43 N. Y. St. 68, 60 N. Y. Super. Ct. 151; Lachaise v. Lord, 1 Abb. Pr. (N. Y.) 213, 10 How. Pr. 461.

[60] Bell v. Merrifield, 28 Hun (N. Y.) 219; Continental Nat. Bank v. Strauss, 60 N. Y. Super. Ct. 151, 43 N. Y. St. 68, 17 N. Y. S. 188. But see Snyder v. Leland, 127 Mass. 291. See also Van Alstyne v. Cook, 25 N. Y. 489; Walkenshaw v. Perzel, 32 How. Pr. (N. Y.) 233, 27 N. Y. Super. Ct. 426.

[61] Corbin v. Boies, 34 Fed. 692; Crouch v. Chicago First Nat. Bank, 156 Ill. 342, 40 N. E. 974; Whitcomb v. Fowle, 7 Abb. N. Cas. (N. Y.) 295, 10 Daly 23, 56 How. Prac. 365; George v. Grant, 20 Hun (N. Y.) 372. See also Jackson v. Sheldon, 9 Abb. Pr. (N. Y.) 127.

[62] Rothchild v. Hoge, 43 Fed. 97.

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by the statutes.[63] However, a creditor by such a suit will not prevail where the firm's assets have been taken in a suit for settlement of its affairs for the benefit of all the creditors or where by voluntary action by the partnership by assignment or otherwise its assets have been placed in course of distribution for the benefit of all the creditors; for by such course the assets have become trust funds for all and it is then too late to seek a preference through judgment and sale.[64]

§ 1033. **Assignment for benefit of creditors.**—While a limited partnership in failing circumstances is prohibited from preferring a part of its creditors, it is not prohibited from making an assignment of its property for the benefit of all its creditors. When, however, it desires to do so all the partners, both general and limited, must join in it or assent to such action.[65] But it is held that a partner who has not assented to an assignment may ratify the action taken by his partners.[66] In the absence of a statute or provision in the certificate of partnership pursuant to a statute authorizing them to do so, the general partners alone have no authority to make an assignment of the

[63] Crouch v. Chicago First Nat. Bank, 156 Ill. 342, 40 N. E. 974; Hall v. Glessner, 100 Mo. 155, 13 S. W. 349; Innes v. Lansing, 7 Paige (N. Y.) 583; Greene v. Breck, 32 Barb. (N. Y.) 73; Hardt v. Levy, 72 Hun (N. Y.) 225, 25 N. Y. S. 248, 55 N. Y. St. 706; Van Alstyne v. Cook, 25 N. Y. 489; Artisans' Bank v. Treadwell, 34 Barb. (N. Y.) 553.

[64] Batchelder v. Altheimer, 10 Mo. App. 181; Greene v. Breck, 32 Barb. (N. Y.) 73; Van Alstyne v. Cook, 25 N. Y. 489; Hardt v. Levy, 72 Hun (N. Y.) 225, 25 N. Y. S. 248, 55 N. Y. St. 706. It has, however, been held in a few cases that the trust attaches upon insolvency of the firm and a creditors' suit will not avail after insolvency, even though no action has been taken to seize the assets for the benefit of all. Jackson v. Sheldon, 9 Abb. Pr. (N. Y.) 127; Innes v. Lansing, 7 Paige (N. Y.) 583; Whitewright v. Stimpson, 2 Barb. (N. Y.) 379; Deming v. Colt, 3 Sandf. (N. Y.) 284.

[65] Rothchild v. Hoge, 43 Fed. 97; Mills v. Argall, 6 Paige (N. Y.) 577; Darrow v. Bruff, 36 How. Pr. (N. Y.) 479; Waters v. Harris, 17 N. Y. S. 370, 28 Abb. N. C. 89, 43 N. Y. St. 62, 60 N. Y. Super. Ct. 192; Deming v. Colt, 3 Sandf. (N. Y.) 284; Singer v. Kelly, 44 Pa. St. 145. But see Robinson v. McIntosh, 3 E. D. Smith (N. Y.) 221.

[66] Deming v. Colt, 3 Sandf. (N. Y.) 284; Darrow v. Bruff, 36 How. Pr. (N. Y.) 479.

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partnership property for the benefit of creditors.[67] It is generally held that any preferences given by such assignment are void and an attempt to give such preferences will enlarge the liability of limited partners to that of general ones.[68] Any attempt to prefer a limited partner in a partnership assignment is void.[69] In an assignment for the benefit of creditors the individual property of limited partners should not be scheduled, since the property of such members is not liable for the partnership debts.[70] Only an insolvent limited partnership can legally make an assignment for the benefit of its creditors, for if it is not insolvent such assignment would hinder and delay its creditors rather than benefit them.[71]

§ 1034. **Limited partner as creditor.**—If a limited partner is to be regarded as a creditor of the partnership it is very generally provided by the statutes that in case of partnership insolvency his claim can not be paid or he be allowed to assert any lien on the partnership assets until the general creditors are satisfied.[72] Some states have by statute provided that a limited partner as to debts due him from the partnership may have the

[67] Schulten v. Lord, 4 E. D. Smith (N. Y.) 206; Havens v. Hussey, 5 Paige (N. Y.) 30; Mills v. Argall, 6 Paige (N. Y.) 577. It has, however, been held that a general partner in Texas may make such an assignment. Graves v. Hall, 32 Tex. 665. See also Waters v. Harris, 17 N. Y. S. 370, 28 Abb. N. C. 89, 43 N. Y. St. 62, 60 N. Y. Super. Ct. 192; Tracy v. Tuffly, 134 U. S. 206, 33 L. ed. 879, 10 Sup. Ct. 527.

[68] Lineweaver v. Slagle, 64 Md. 465, 54 Am. Rep. 775; Hardt v. Levy, 72 Hun (N. Y.) 226; Durant v. Abendroth, 97 N. Y. 132; Bowen v. Argall, 24 Wend. (N. Y.) 496; Singer v. Kelly, 44 Pa. St. 145.

[69] Tracy v. Tuffly, 134 U. S. 206, 33 L. ed. 879, 10 Sup. Ct. 527; Baily v. Hornthal, 154 N. Y. 648, 49 N. E. 56, 61 Am. St. 645; Mills v. Argall, 6 Paige (N. Y.) 577.

[70] Tracy v. Tuffly, 134 U. S. 206, 33 L. ed. 879, 10 Sup. Ct. 527. Under a statute of Minnesota it is held such an assignment must also include the individual property of limited partners. May v. Walker, 35 Minn. 194, 28 N. W. 252; In re Allen, 41 Minn. 430, 43 N. W. 382.

[71] Deming v. Colt, 3 Sandf. (N. Y.) 284.

[72] Tracy v. Tuffly, 134 U. S. 206, 33 L. ed. 879, 10 Sup. Ct. 527; Clapp v. Lacey, 35 Conn. 463; Jaffe v. Krum, 88 Mo. 669; Bowen v. Argall, 24 Wend. (N. Y.) 496; Ward v. Newell, 42 Barb. (N. Y.) 482, 28 How. Prac. 102; George v. Carpenter, 73 Hun (N. Y.) 225; Dunning's Appeal, 44 Pa. St. 150; McGeorge v. Harrison

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same rights and remedies given to other general creditors.[73] In Tennessee under a statute which provided that a limited or special partner, in case of insolvency of the partnership, should not be allowed to claim as a creditor until the claims of all other creditors were paid, it was held that a debt from the firm to one who unsuccessfully attempted to become a limited partner could not be set off against an individual liability to contribute to the firm debts as a general partner.[74]

§ 1035. Causes for dissolution.—The same causes which will force the dissolution of a general partnership will be ground for dissolving a limited partnership.[75] It may result from a fraud practiced on the limited partners by the general partners.[76] It may be caused by the abandonment of the business by the general partners.[77] A limited partnership desiring to wind up its affairs before the expiration of the term must dissolve the relationship in the manner provided by statute;[78] and the partnership will, as far as creditors are concerned, continue to exist, unless the certificate of dissolution meets the requirements of the statute.[79] As in the case of general partnerships, it has been held that the death of a member of a limited partnership dissolves the firm.[80] So also a change in the membership of the

Chemical Mfg. Co., 141 Pa. St. 575, 21 Atl. 671; McArthur v. Chase, 13 Grat. (Va.) 683; Ussery v. Crusman (Tenn.), 47 S. W. 567; Savage v. Carney (Tenn.), 47 S. W. 571.

[73] Walkenshaw v. Perzel, 32 How. Pr. (N. Y.) 233, 27 N. Y. Super. Ct. 426; Casola v. Kugelman, 33 N. Y. App. Div. 428, 54 N. Y. S. 89; White v. Hackett, 20 N. Y. 178; McArthur v. Chase, 13 Grat. (Va.) 683; California Civ. Code, § 2490. See the statutes of particular state. See also McGeorge v. Harrison Chemical Mfg. Co., 141 Pa. St. 575, 21 Atl. 671.

[74] Ussery v. Crusman (Tenn.), 47 S. W. 567. See also Hotopp v. Huber, 44 N. Y. S. 617, 160 N. Y. 524, 55 N. E. 206. See Ohio Code, § 8055.

[75] Continental Nat. Bank v. Strauss, 137 N. Y. 148, 32 N. E. 1066.

[76] Tournade v. Methfessel, 3 Hun (N. Y.) 144; Outcalt v. Burnet, 1 Handy (Ohio) 404, 12 Ohio Dec. 207.

[77] Andrews v. Schott, 10 Pa. St. 47.

[78] Emery v. Kalamazoo &c. Const. Co., 132 Mich. 560, 94 N. W. 19.

[79] In re Terry, 5 Biss. (U. S.) 110, Fed. Cas. No. 13836. See also Beers v. Reynolds, 11 N. Y. 97.

[80] Jacquin v. Buisson, 11 How. Pr. (N. Y.) 385. See also Ames v. Downing, 1 Bradf. Sur. (N. Y.) 321.

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firm has been held to work a dissolution thereof.[81] Moreover, where the statute provides that every alteration which is made in the names of the partners, the nature of the business, or any other matter specified in the original certificate, must be deemed a dissolution of the partnership, the abandonment of the business by the general partners and their departure from the state, whereby the special partner is left to settle the partnership affairs, has been held to dissolve the firm.[82] Notwithstanding ground for dissolution is contained in the act of a general partner in engaging in a competing business without the consent or over the objections of his limited copartner, the latter may, in the absence of statutory provisions to the contrary, engage in such business without thereby incurring the penalty of dissolution.[83] Although a limited partner became such in order that there might be the three persons necessary to form a limited partnership, this will not deprive him of his right to share in the profits of the firm upon dissolution.[84] When a limited partnership is dissolved because of the expiration of the term for which it was organized, no notice need be given as required in the dissolution of a general partnership; for the certificate on file and recorded sufficiently notifies the public of when the partnership will terminate.[85] But where by mutual consent of all the partners it is desired to dissolve the partnership prior to the termination of the period for which it was formed, the statutes generally provide that a notice of its intention to dissolve shall be filed and recorded where the certificate is recorded and that such notice be also published in a paper of a designated kind for a period of time named.[86] Where an attempt was made to dissolve a limited part-

[81] Outcalt v. Burnet, 1 Handy 404, 12 Ohio Dec. 207.

[82] Andrews v. Schott, 10 Pa. St. 47.

[83] Skolny v. Richter, 139 App. Div. (N. Y.) 534, 124 N. Y. S. 152.

[84] Sturgeon v. Apollo Oil &c. Co., 203 Pa. 369, 53 Atl. 189.

[85] Marshall v. Lambeth, 7 Rob. (La.) 471; Haggerty v. Taylor, 10 Paige (N. Y.) 262.

[86] In re King, Fed. Cas. No. 7779; Emery v. Kalamazoo &c. Const. Co., 132 Mich. 560, 94 N. W. 19; Beers v. Reynolds, 11 N. Y. 97; Fanshawe v. Lane, 16 Abb. Pr. (N. Y.) 71; Bulkley v. Marks, 15 Abb. Pr. (N. Y.) 454.

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nership, and two months before the end of the term of the limited partnership, on notice to members of a meeting for consideration of a final settlement of the partnership affairs and distribution of its assets, a resolution was passed for exchange of its property for the stock of a corporation and division of the stock among its members, the court held that this was not a termination of its business at the end of its term, but a voluntary winding up of its affairs, which the law provided should be done in another way.[87]

§ 1036. **Rights and liabilities of partners.**—The liabilities of the general members of a limited partnership as well as their rights as partners are governed by the common law except where the statutes have changed the common law.[88] Since the liability of the general members of a limited partnership are in the main the same as those in general partnerships nothing more need now be said as to them; but the rights and duties of the general partners in a limited partnership are not the same as those in a general partnership. The general partners in a limited partnership have the exclusive right and are, by the relationship in which they find themselves, bound to manage the partnership business without the aid of limited partners who have contributed to the partnership capital.[89] Generally the statutes provide that if the limited members of the firm have anything to do with managing the partnership business the partnership becomes a general one and they become liable as general partners.[90] The general partners having the exclusive management of the partnership's business, are in duty bound to account to the limited members of the

[87] Emery v. Kalamazoo & H. Const. Co., 132 Mich. 560, 94 N. W. 19.

[88] Jemison v. Dearing, 41 Ala. 283; Spalding v. Black, 22 Kans. 55; Nutting v. Ashcroft, 101 Mass. 300; Lancaster v. Choate, 5 Allen (Mass.) 530; Jaffe v. Krum, 80 Mo. 670; Continental Nat. Bank v. Strauss, 60 N. Y. Super. Ct. 151, 43 N. Y. St. 68, 17 N. Y. S. 188.

[89] Richardson v. Carlton, 109 Iowa 515, 80 N. W. 532; Columbia Land &c. Co. v. Daly, 46 Kans. 504, 26 Pac. 1042; Ussery v. Crusman (Tenn.), 47 S. W. 567; Whittemore v. Macdonnell, 6 U. C. C. P. 547.

[90] Hogg v. Ellis, 8 How. Pr. (N. Y.) 473.

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firm and to each other the same as partners are required to do in an ordinary general partnership.[91] The general partners in such a partnership are liable for all of the firm's debts and obligations the same as are the members of a general partnership, without any reference to what amount of interest they hold in it.[92] And the limited partners are not liable for any of such debts or obligations, provided the statute has been complied with and they be not estopped by their conduct to claim the protection of the statutes under which the partnership was formed.[93] If a limited partner for any reason has become liable as a general partner, his liability will continue notwithstanding his death, and the creditors may collect thereon from his estate.[94] And it is held that even if a limited partnership has been through bankruptcy and secured its discharge and the discharge of the general partners in whose names the firm business was transacted, still a creditor may pursue a limited partner who has for any reason become liable as a general partner.[95] Even though the statute has not been complied with, resulting in the limited partner becoming liable with the general partners for firm debts and obligations, still he is not liable for torts committed by the general partners where the commission of these torts has no connection with the noncompliance in the statute.[96] The general partners

[91] Continental Nat. Bank v. Strauss, 60 N. Y. Super. Ct. 151, 43 N. Y. St. 68, 17 N. Y. S. 188; Hogg v. Ellis, 8 How. Pr. (N. Y.) 473; Ames v. Downing, 1 Bradf. Sur. (N. Y.) 321.

[92] Selden v. Hall, 21 Mo. App. 452; Andrews v. Schott, 10 Pa. St. 47; Pope Mfg. Co. v. Charleston Cycle Co., 55 S. Car. 528, 33 S. E. 787; Patterson v. Holland, 7 Grant Ch. (U. C.) 1.

[93] Tracy v. Tuffly, 134 U. S. 206, 33 L. ed. 879, 10 Sup. Ct. 527; In re Merrill, 12 Blatchf. (U. S,) 221, Fed. Cas. No. 9467; Clapp v. Lacey, 35 Conn. 463; Richardson v. Carlton, 109 Iowa 515, 80 N. W. 532; Spalding v. Black, 22 Kans. 55; Ulman v. Briggs, 32 La. Ann. 655; Snyder v. Leland, 127 Mass. 291; Jaffe v. Krum, 88 Mo. 670; Madison County Bank v. Gould, 5 Hill (N. Y.) 309; First Nat. Bank v. Whitney, 4 Lans. (N. Y.) 38; George v. Grant, 97 N. Y. 262; Van Riper v. Poppenhausen, 43 N. Y. 68; Singer v. Kelly, 44 Pa. St. 145.

[94] Jersey City First Nat. Bank v. Huber, 75 Hun (N. Y.) 80; Watts v. Taft, 16 U. C. Q. B. 256.

[95] Abendroth v. Van Dolsen, 131 U. S. 66, 33 L. ed. 57, 9 Sup. Ct. 619.

[96] McKnight v. Ratcliff, 44 Pa. St. 156. But see Guillou v. Peterson, 89 Pa. St. 163.

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charged with the conduct of the partnership business have no authority where it is not expressly conferred upon them, to bind the limited partners by acts not within the scope of the business as shown by the certificate filed and recorded.[97] When a limited partner has not consented to a change of the scope of the partnership business from that shown in the certificate of partnership, even a continued departure from the scope of business by the general partners will not have the legal effect to change the scope of business which the partnership is authorized to do.[98] In case a creditor seizes the partnership assets in his attempt to collect an individual debt due him from a general partner a limited partner has all the rights of a general partner to prevent the whole of the property from being taken to satisfy such a debt, and he may bring an action against the person or officer on account of such trespass.[99] The limited partner may by proper proceedings force the general partners or those in control of the business to conform to the partnership article or to secure an accounting from them and a dissolution of the firm.

§ 1037. **Rights of partners on dissolution.**—When a limited partnership is dissolved its general partners are charged with the duty of winding up its business affairs, but they can not bind the limited partners by incurring new obligations in the absence of their assent thereto.[1] Upon the dissolution of the partnership where the general partner or partners are unwilling or unable to wind up the affairs of the firm a limited partner may do so without making himself liable for the debts, for he is not thereby conducting the firm business, but only winding up the business and causing the assets to be applied to its obligations

[97] Taylor v. Rasch, 1 Flipp. (U. S.) 385; Lawrence v. Batchelder, 131 Mass. 504.

[98] Taylor v. Rasch, 1 Flipp. (U. S.) 385.

[99] Spalding v. Black, 22 Kans. 55.

[1] Slocomb v. De Lizardi, 21 La. Ann. 355, 99 Am. Dec. 740; Richter v. Poppenhausen, 42 N. Y. 373, 9 Abb. Pr. (N. S.) 263, 57 Barb. 309, 39 How. Pr. 82; Waters v. Harris, 17 N. Y. S. 370, 28 Abb. N. C. 89, 43 N. Y. St. 62, 60 N. Y. Super. Ct. 192; Pusey v. Dusenbury, 75 Pa. St. 437; Singer v. Kelly, 44 Pa. St. 145; Farmers' Bank v. Ritter, 12 Atl. 659, 9 Sad. (Pa.) 433, 22 Wkly. Notes Cas. (Pa.) 128.

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and effecting a distribution of such assets among the partners entitled thereto.[2] In the absence of a statute changing the rule, upon dissolution of a limited partnership the assets are to be distributed the same as in case of the dissolution of a general partnership.[3] An action for an accounting and for dissolution of a limited partnership is governed by the same rules as an action for a similar purpose against a general partnership. Upon winding up the business of a limited partnership at the end of the period for which it was formed or sooner by operation of law, a limited member, after the debts of the firm are paid, is entitled to receive the amount of his contribution with the interest thereon together with his share of the profits of the partnership business.[4] But where general partners are intending to continue the business after dissolution, it will not be presumed in the absence of proof, that a limited partner whose name in the conduct of the partnership business has not been used, is entitled as a matter of course to any payment on account of the good will of the business.[5]

[2] Spalding v. Black, 22 Kans. 55.

[3] Emery v. Kalamazoo &c. Const. Co., 132 Mich. 560, 94 N. W. 19; Tillinghast v. Walton, 4 N. Y. St. 35; Sturgeon v. Apollo Oil &c. Co., 203 Pa. St. 369, 53 Atl. 189.

[4] Artisans' Bank v. Treadwell, 34 Barb. (N. Y.) 553; Harris v. Murray, 28 N. Y. 574, 86 Am. Dec. 268.

[5] Ryan v. Franklin, 199 N. Y. 347, 116 N. Y. S. 1146, 92 N. E. 673.

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CHAPTER XXXII

JOINT STOCK COMPANIES

SECTION
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§ 1045. Definition and general nature.—A joint stock company may be defined as an unincorporated and voluntary association formed for the purpose of profit, having a common name, possessing a common capital contributed by the persons composing it, which capital is divided or agreed to be divided into shares of which each member possesses one or more, and which represent the interests of the members, and are transferable by the owner without the express consent of the other members or the creditors of the association.[1] "Joint stock companies may be cited as quasi corporations of a private character. They are associations having some of the features of an ordinary common-law copartnership, and some of the features of a private corpora-

[1] Cyc., Joint Stock Companies; Bradford v. National Benefit Association, 26 App. D. C. 268; Kossakowski v. People, 177 Ill. 563, 53 N. E. 115; Adams Express Co. v. Schofield, 111 Ky. 832, 64 S. W. 903, 23 Ky. L. 1120; Oliver v. Liverpool & London Life &c. Ins. Co., 100 Mass. 531; Pennsylvania Ins. Co. v. Murphy, 5 Minn. 36; Lane v. Albertson, 78 App. Div. 607, 79 N. Y. S. 947; Hedge's Appeal, 63 Pa. St. 273; Allen v. Long, 80 Tex. 261, 16 S. W. 43, 26 Am. St. 735; Willis v. Chapman, 68 Vt. 459, 35 Atl. 459.

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tion."[2] Those definitions in which a joint stock company is denominated a partnership, contemplate the individual liability to third persons imposed by the law upon the members of the association, rather than the nature of the company in respect to its formation, the management of its affairs, its duration and dissolution which are among its distinctive characteristics. The law is well and uniformly settled that persons who as between themselves have not entered into a partnership agreement may still as to other persons incur liabilities as if they were in fact partners.[3] And upon the same principle though the members of a joint stock association may be regarded as partners in respect to third persons, still the association is not an agreement by a number of persons that they will be copartners; but it is an agreement between the owners of shares of capital invested in a common enterprise for the purpose of profit that they or their duly recognized assigns, the owners of the shares for the time being, whoever they may be, shall carry on and continue an association together, sharing profits and bearing losses.[4] From the preceding definitions we may deduce the following observations concerning the general nature of joint stock companies: (a) Such a company owes its existence to the contracts of its members as set forth in the articles of association by virtue of which it has a valid legal entity under the common law, with a right to extend its existence as the parties forming it may see fit to provide in such agreement.[5] But as hereinafter shown they are largely regulated by statute in many jurisdictions. The real character of the association must in each case be determined by the laws and the articles of agreement under which it is formed, and courts reading such articles in the light of conditions existing at the time they were made will, as far as possible, give effect to the same among the members themselves when they themselves only are interested,[6]

[2] 1 Morawetz Corp., § 6.

[3] Wadsworth v. Duncan, 164 Ill. 360, 45 N. E. 132; Hodgson v. Baldwin, 65 Ill. 532; Pettus v. Atkins, 60 Ill. 454; Ashley v. Dowling, 203 Mass. 311, 89 N. E. 434.

[4] Baird's Case, L. R. 5 Ch. 725, 23 L. T. 424, 18 W. R. 1094.

[5] Spraker v. Platt, 158 App. Div. 377, 143 N. Y. S. 440; Hibbs v. Brown, 190 N. Y. 167, 82 N. E. 1108.

[6] Robbins v. Butler, 24 Ill. 387;

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and for the purpose of determining the fiduciary relations existing between the association and its members, the association itself through all the changes in its membership, may be regarded at least in equity, as an ideal separate entity involving and possessing equitable rights and relations.[7] (b) Since the association is based solely upon the common-law right of the members to contract with each other, there seems to be no reason why they may not legally do all the things they usually undertake to do, nor why the courts may not apply to them the same principles which permit parties to agree upon such forms of association as they may choose and hold these terms to be binding upon all who agree to them expressly or impliedly, but upon no other persons.[8] As between themselves, therefore, each member of an unincorporated association, after all the assets of the company are exhausted, is bound to pay his proportion of the debts of the concern; but as to the creditors each member is liable for all such debts,[9] no matter what the private arrangements among the members may be. They might stipulate with each other in the articles of association that they shall not be responsible other than out of joint funds, yet as to the rest of the world it is clear that each is liable to the whole amount of debts contracted, nor can this liability be shifted except by a transfer of shares in the exact mode prescribed by the articles of association.[10] (c) The association has a common name, which is usually descriptive of the business for which it is formed and does not consist of the names of persons. In this name it may enter into contracts in the manner prescribed by the articles of association, and may generally sue and be sued under that name. (d) The capital of the company is divided into shares, and the number of shares

Ashley v. Dowling, 203 Mass. 311, 89 N. E. 434.

[7] McDowell v. Joice, 149 Ill. 124, 36 N. E. 1012.

[8] Pennsylvania Ins. Co. v. Murphy, 5 Minn. 56; Henry v. Jackson, 37 Vt. 431.

[9] Hodgson v. Baldwin, 65 Ill. 532; Henkel v. Heyman, 91 Ill. 96; Lewis v. Tilton, 64 Iowa 220, 19 N. W. 911; Bodey v. Cooper, 82 Md. 625, 34 Atl. 362; Cutler v. Thomas, 25 Vt. 73.

[10] Lyon v. Denison, 80 Mich. 371, 45 N. W. 358, 8 L. R. A. 358.

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held by each member determines his interest and the extent of his control of the management, and as between the members themselves fixes his proportion of liability for debts of the association. Ordinarily these shares represent a certain amount of money, or the value of property transferred to the company by the shareholders; but it seems that such payment or transfer is not an indispensable requisite. As where certain owners in severalty of adjacent parts of a tract of land laid the same off into a town site, and organized a company to sell the lots, and there was no conveyance to the company of the interests of the several owners, but each shareholder received his quota of stock, and the articles of association provided that deeds for lots sold were to be executed by the president and secretary, it was held that the organization was a joint stock company and that the lots became in fact the property of the association from the proceeds of the sale of which each holder of shares received his proportion.[11] (e) The shares are transferable at the will of the owner, or at his death become assets of the estate in the hands of his personal representative. That the shares are transferable is evidence of the intent that such death or transfer shall not result in the dissolution of the company and gives it the quality of perpetual succession.[12] The transfer of shares must be made in conformity with the articles of association, for by these the shareholders have themselves provided the means by which their interests, rights and liabilities in the company may be made to devolve upon others and to these they must be held.

§ 1046. Distinguished from corporations.—The fundamental distinction between a joint stock company and a corporation is the manner in which each is formed. The corporation owes its existence to a grant of authority by the sovereign power of the state, being created by a special act or receiving its authority by compliance with a general law providing for such organizations, under such a grant of privileges as secures a succession of

[11] Batty v. Adams, 16 Nebr. 44, 20 N. W. 15.

[12] Hossack v. Ottawa Development Co., 244 Ill. 274, 91 N. E. 439.

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members without changing its identity; while a joint stock company is formed by the agreement of the individuals comprising it, and their relation to each other is the product of such agreement and does not depend upon any grant of authority from the state but upon the legal right and capacity of the parties to form the contract of association. The special act, or the certificate issued under the general law, creating the corporation is its charter and its effect in creating the artificial person possessing legal capacity[13] is to merge the individual rights in the artificial body and to eliminate the individual liability of its members for corporate acts under some part of such liability is expressly preserved by constitutional or statutory provision.[14] "The distinction between a corporation and a joint stock association as concerns the point for decision, is that a corporation is an artificial entity existing in contemplation of law in the state of its creation. It can have no existence elsewhere and is recognized in other jurisdictions only by comity. It is a citizen within the meaning of certain provisions of the Federal Constitution. Whereas a joint stock association, though it have some of the rights of a corporation and may sue and be sued in the name of its president, still does not exist as an entity distinct from its members. * * * Even, if, unlike a partnership, which it really is, it can be said to exist as an artificial being, it owes its existence not to the state, but to the contract of its members, and may therefore be said to exist wherever it does business or owns property. In that sense its analogy to a corporation is to one organized under the laws of two or more states."[15] It has been said that a joint stock company is a partnership with some of the powers of a corporation.[16] The articles of association bear the same relation to the joint stock company as the charter does to a corporation in regulating the duties and obligations of the members among

[13] People v. Assessors of Watertown, 1 Hill (N. Y.) 616.

[14] Liverpool Ins. Co. v. Massachusetts, 10 Wall. (U. S.) 566, 19 L. ed. 1029; Niagara v. People, 7 Hill (N. Y.) 504.

[15] In re Willmer, 153 App. Div. 804, 138 N. Y. S. 649.

[16] People v. Coleman, 133 N. Y. 279, 31 N. E. 96, 16 L. R. A. 183; Van Aernam v. Blustein, 102 N. Y. 355, 7 N. E. 537.

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themselves, but as they are of a contractual nature, the individual personal liability of the members to persons not parties to such agreement remains in full force unless there is some express statutory provision limiting the same.[17] Though the company has a recognized entity possessing certain legal capacities such is not wholly distinct from that of the individuals composing it, and whatever name it may assume and use in the transaction of its business it is not a corporate designation.[18] The essential distinction as to the formation of the company and its legal entity is not changed by the fact that its capital is represented by certificates transferable without working its dissolution;[19] nor that it is controlled by a board of directors and that individual members can not as such make contracts in its behalf;[20] nor that under modern legislation it may possess other powers formerly considered as conferred only upon corporations by reason of which the distinction between them is in many cases rendered obscure.[21] A joint stock company, like a corporation, usually transacts its business by a board of directors or trustees, and sues and is sued as an individual, but its members, like partners, are personally liable.[22] Some joint stock companies resemble corporations in that they have a capital stock divided into shares, and do business

[17] Gifford v. Livingston, 2 Denio (N. Y.) 380.

[18] Williams v. Bank of Michigan, 7 Wend. (N. Y.) 540.

[19] Oak Ridge Coal Co. v. Rogers, 108 Pa. St. 147.

[20] Bank of Topeka v. Eaton, 107 Fed. 1003.

[21] People v. Rose, 219 Ill. 46, 76 N. E. 42; People v. Coleman, 133 N. Y. 279, 31 N. E. 96, 16 L. R. A. 183; People v. Wemple, 117 N. Y. 136, 22 N. E. 1046, 6 L. R. A. 303.

[22] Frost v. Walker, 60 Maine 468; Whitman v. Porter, 107 Mass. 522; Bodwell v. Eastman, 106 Mass. 525; Taft v. Ward, 106 Mass. 518; Hoadley v. Essex, 105 Mass. 519; Oliver v. Liverpool &c. Co., 100 Mass. 531; Dow v. Sayward, 12 N. H. 271; Bray v. Farwell, 81 N. Y. 600; Livingston v. Lynch, 4 Johns. Ch. (N. Y.) 573; Warner v. Beers, 23 Wend. (N. Y.) 103, 196; Townsend v. Goewey, 19 Wend. (N. Y.) 424, 32 Am. Dec. 514; Williams v. Bank of Michigan, 7 Wend. (N. Y.) 539; In re Gibbs, 157 Pa. St. 59, 27 Atl. 383, 22 L. R. A. 276n; Burnes v. Pennell, 2 H. L. Cas. 497; Wormwell v. Hailstone, 6 Bing. 668, 4 M. & P. 512, 8 L. J. (O. S.) C. P. 264; Harrison v. Timmins, 4 M. & W. 510, 7 D. P. C. 28, 8 L. J. Ex. 94; Cape's Executors' Case, 2 DeG., M. & G. 573; Bartlett v. Pentland, 1 B. & Ad. 704.

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under a corporate name and through a common agency.[23] "Joint stock company" in early Massachusetts statutes was equivalent to corporation organized under general laws.[24] A corporation being an artificial legal entity existing in contemplation of law in the state where it is created, it can have no existence elsewhere and is recognized in other jurisdictions only by comity. It is therefore considered a citizen of that state for the purpose of giving jurisdiction to the federal courts in controversies between citizens of different states. It was formerly held that a joint stock company having practically all the powers and attributes of a corporation, must also be considered as an artificial citizen for jurisdictional purposes without regard to the citizenship of its members, but it is now well settled that it is necessary to set up the citizenship of the individual members for this purpose,[25] for though it has some of the rights of a corporation still it does not exist as an entity distinct from its members.[26] And in the matter of taxation joint stock companies differ from corporations in several particulars; their capital stock is not taxable unless they are expressly included in the terms of the statute;[27] their personal property is taxable where the business is carried on, since the company, being the creature of the contract of its members, may

[23] Boston & Albany R. Co. v. Pearson, 128 Mass. 445; Tappan v. Bailey, 4 Metc. (Mass.) 529; Edgeworth v. Wood, 58 N. J. L. 463, 33 Atl. 940; People v. Wemple, 117 N. Y. 136, 22 N. E. 1046, 6 L. R. A. 303n; People v. Coleman, 133 N. Y. 279, 31 N. E. 96, 16 L. R. A. 183; McCabe v. Goodfellow, 133 N. Y. 89, 30 N. E. 728, 17 L. R. A. 204n; Van Aernam v. Blustein, 102 N. Y. 355, 7 N. E. 537, 2 N. Y. St. 470; Wells v. Gates, 18 Barb. (N. Y.) 554; Opdyke v. Marble, 18 Abb. Pr. (N. Y.) 266; Barndollar v. DeBois, 142 Pa. St. 565, 21 Atl. 988; Willis v. Chapman, 68 Vt. 459, 35 Atl. 459.

[24] Attorney General v. Mercantile Co., 121 Mass. 524.

[25] Great Southern &c. Hotel Co. v. Jones, 177 U. S. 449, 44 L. ed. 482, 20 Sup. Ct. 690; Grace v. American Cent. Ins. Co., 109 U. S. 278 (and cases cited there), 27 L. ed. 932; Lafayette Ins. Co. v. French, 18 How. (U. S.) 404, 15 L. ed. 451.

[26] Chapman v. Barney, 129 U. S. 677, 32 L. ed. 800, 9 Sup. Ct. 426. "An artificial person called a joint stock association having some of the characteristics of a partnership and some of a corporation." Hill v. Stetler, 127 Pa. St. 145, 13 Atl. 306.

[27] People v. Coleman, 133 N. Y. 279, 31 N. E. 96, 16 L. R. A. 183.

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be said to exist wherever it does business or owns property;[28] the members are taxable as partners and not as stockholders, and therefore the shares are not taxable under a statute as stocks in a moneyed corporation.[29] But a joint stock company organized in one state or country which possesses all the other attributes of a corporation may be taxed upon business done in another state under a statute imposing such a tax on foreign corporations doing business within the state. Where a foreign joint stock association organized in England which by deed of settlement under certain acts of parliament possessed a distinct artificial name by which it could make contracts, a statutory authority to sue and be sued in the name of its officers as representing the association, a statutory recognition as an entity distinct from its members by allowing them to sue it and be sued by it, and a provision for its perpetuity by transfer of shares so as to secure a succession of membership it was held to be a corporation for the purpose of taxation within the meaning of an act taxing corporations in that name, upon the ground that "when by legislative sanction an association is formed capable of acting independently of the rules and principles that govern a simple partnership it is so far clothed with corporate powers that it may be treated for the purposes of taxation as an artificial body subject to the jurisdiction of the government under which it undertakes to act in its associated capacity.[30] And it appears that in some instances the word "corporation" is by constitutional or statutory provisions to be construed to include joint stock associations so as to have service of process upon an officer or other representative of the company. Though considered in this respect as a quasi corporation, such a company does not lose its distinctive character as a partnership.[31]

[28] In re Wilmer, 153 App. Div. 804, 138 N. Y. S. 649.

[29] Hoadley v. Essex, 105 Mass. 519.

[30] Liverpool Ins. Co. v. Massachusetts, 10 Wall. (U. S.) 566, 19 L. ed. 1029; Oliver v. Insurance Co., 100 Mass. 531; People v. Coleman, 133 N. Y. 279, 31 N. E. 96, 16 L. R. A. 183.

[31] Adams Express Co. v. Schofield, 111 Ky. 833, 64 S. W. 903, 23 Ky. L. 1120; State v. Adams Express Co., 66 Minn. 271, 68 N. W. 1085, 38 L. R. A. 225; Express Co. v. State, 55 Ohio St. 69, 44 N. E. 506; Platt v. Colvin, 50 Ohio St. 703, 36 N. E. 735.

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An agreement whereby many persons are brought into one artificial body, and in the same instrument proposing to conduct its affairs by the power given to it in the mode prescribed by the legislature, will be deemed to be incorporated—that is, formed or united under the law of the state, whether the artificial body be termed a corporation, a joint stock company or association.[32]

§ 1047. **Distinguished from ordinary partnerships.**—The essential mark of distinction between a joint stock company and an ordinary partnership is the right of the holder of any interest in the former whether great or small to transfer such interest to a stranger without the consent of his co-owners.[33] By this the membership is subject to changes at the will of individual shareholders and the company is capable of perpetual continuance. There is no right of the members of a joint stock company to decide what new partners shall be admitted to the firm. Such a right is called delectus personæ and is an inherent quality of an ordinary partnership.[34] The reason is that a joint stock company usually consists of a large number of persons among whom there is no special bond of confidence and friendship, it is a matter of comparative indifference who compose it, and the retirement or the death of a member is no cause for its dissolution. A partnership, on the other hand, though it may consist of any number of persons, is generally composed of a few, attracted to each other by mutual confidence, which is such an element of their association that neither is at liberty to retire and substitute others as partners, and the decease of one member should and does work

[32] Edgeworth v. Wood, 58 N. J. L. 463, 33 Atl. 940; People v. Wemple, 117 N. Y. 136, 22 N. E. 761, 6 L. R. A. 303n; Fargo v. McVicker, 55 Barb. (N. Y.) 437.

[33] Cincinnati, N. O. & T. P. R. Co. v. Citizens' Nat. Bank, 11 Ohio Dec. 50; Hedge's Appeal, 63 Pa. St. (13 P. F. Smith) 273.

[34] Taylor v. Castle, 42 Cal. 367; Spotswood v. Morris, 12 Idaho 360, 85 Pac. 1094, 6 L. R. A. (N. S.) 665; Joseph v. Davenport, 116 Iowa, 268, 89 N. W. 1081; Ashley v. Dowling, 203 Mass. 311, 89 N. E. 434, 133 Am. St. 296; Phillips v. Blatchford, 137 Mass. 510; Oak Ridge Coal Co. v. Rogers, 108 Pa. St. 147; Hedge's Appeal, 63 Pa. St. 273; Carter v. McClure, 98 Tenn. 109, 38 S. W. 585, 60 Am. St. 842, 36 L. R. A. 282; Industrial Lumber Co. v. Texas Pine Land Assn., 31 Tex. Civ. App. 375, 72 S. W. 875; Story Partnership, § 5.

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a complete dissolution of the firm.[35] It is an unvarying rule of law that to form a partnership, at least so far as the parties themselves are concerned, the consent of both the contracting parties is required.[36] The consent to receive a new partner must therefore be unanimous.[37] This doctrine excludes even executors and representatives of partners succeeding their decedent in the state and condition of partners.[38] Though the English courts have given some recognition to the theory that there is nothing inconsistent with the association being a partnership in the fact that the partners' interests are transferable, such a doctrine is generally rejected by our courts.[39] Another characteristic of a joint stock company which distinguishes it from a partnership is that the authority to manage the business is conferred upon the directors or other designated officers of the association, and a shareholder as such has no power to contract for the company. There is no implied authority for a member of the company to act as its representative. Where the articles of association provided for a choice of officers, and that the president and directors should have the exclusive direction of all the concerns of the company, they were held to create a joint stock company rather than a partnership and the members are tenants in common of the property belonging to the company.[40] In the absence of express provisions, or statutory regulation, the rights and liabilities of the members of a joint stock company are to be determined by substantially the same rules as those governing members of a commercial partnership.[41]

[35] Joseph v. Davenport, 116 Iowa 268, 89 N. W. 1081; Carter v. McClure, 98 Tenn. 109, 38 S. W. 585, 36 L. R. A. 282, 60 Am, St. 842; Willis v. Chapman, 68 Vt. 459, 35 Atl. 459.

[36] Bennett v. Pulliam, 3 Ill. App. 185.

[37] Meaher v. Cox, 37 Ala. 201; Burnett v. Snyder, 76 N. Y. 344.

[38] Kingman v. Spurr, 7 Pick. (Mass.) 235.

[39] Solomon v. Kirkwood, 55 Mich. 256, 21 N. W. 336.

[40] Taylor v. Castle, 42 Cal. 367; Jones v. Clark, 42 Cal. 180; McConnell v. Denver, 35 Cal. 365, 95 Am. Dec. 107; Hossack v. Ottawa Development Assn., 244 Ill. 274, 91 N. E. 439; Cox v. Bodfish, 35 Maine 302; Livingston v. Lynch, 4 Johns. Ch. (N. Y.) 573; Irvine v. Forbes, 11 Barb. (N. Y.) 587.

[41] Clagett v. Kilbourne, 1 Black (U.

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§ 1048. Distinguished from mining companies.—Mining companies or mining partnerships as they are commonly termed, constitute another class of associations for profit, from which joint stock companies must be distinguished. The origin of this species of partnerships in this country is traceable to the early periods of mining in the west. Settlements were made in the mining regions before there was an established government there. Under these conditions transactions among the settlers in respect to the acquisition and development of mining properties rested upon the usages and customs which grew up among them. In some localities these accepted usages were reduced to writing and adopted by the communities, which by virtue of their fair and equitable character were after the organization of government, recognized and sanctioned by the courts, and much of the subsequent legislation upon mining partnerships has been declaratory of this "common law of mines."[42] A mining partnership is like a joint stock company in that there is no delectus personæ. The transfer of an interest does not dissolve the partnership, but the purchaser becomes a partner, nor does the death of a member work a dissolution. It is not created by written articles of agreement as a joint stock company is, but arises when two or more persons own or acquire a mining claim for the purpose of working it and extracting the minerals therefrom *and actually engage in mining the same.*[43] It does not arise from a mere cotenancy, but from such ownership and the joint working of the mine, and if there are a number of cotenants and any two of them join in extracting the minerals a mining partnership exists as to them, though there be no express agreement to become partners or to share in the profits.[44] Since the joint working of the

S.) 346, 17 L. ed. 213; Phillips v. Blatchford, 137 Mass. 510; Butterfield v. Beardsley, 28 Mich. 412; Wells v. Gates, 18 Barb. (N. Y.) 544; McFadden v. Leeka, 48 Ohio St. 513, 28 N. E. 874; Hedge's Appeal, 63 Pa. St. 273.

[42] Kahn v. Central Smelting Co., 102 U. S. 641, 26 L. ed. 266.

[43] Marks v. Gates, 2 Alaska 519; Ferris v. Baker, 127 Cal. 520, 59 Pac. 937; Stuart v. Adams, 89 Cal. 367, 26 Pac. 970; Decker v. Howell, 42 Cal. 636; Skillman v. Lachman, 23 Cal. 198, 83 Am. Dec. 96; Higgins v. Armstrong, 9 Colo. 38, 10 Pac. 232; Freeman v. Hemenway, 75 Mo. App. 611.

[44] Mader v. Norman, 13 Idaho 585,

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mine is basis of the partnership a cessation of such work without an agreement to resume dissolves the relation and the parties again become mere tenants in common of the property owned.[45] These propositions, however, do not preclude the issuance of stock representing the interest held by the owners in different proportions which are transferable at the will of the owner. These associations differ from joint stock companies also in respect to the conduct of the business. It does not require the consent of all members of the partnership as in joint stock companies, but is controlled by the decision of those owning a majority of the shares; but if these attempt to exercise powers not necessary and proper for the success of the enterprise a minority may resort to the courts for partition and redress.[46] Each member of a mining company is in a limited sense the agent of the others by virtue of their relationship. The rule as stated by Bainbridge, page 589, is that "the limit of such agency must be determined by the general usages of trade applicable to the particular branch of industry in which the society is engaged. The authority of one partner to bind another will in all cases be presumed to exist so far as by the general usage of persons engaged in similar pursuits it has been determined to be necessary for effectually conducting the business. In the absence of a particular practice established by usage it will be referred to the general principle upon which customs are founded, viz: whether the act can be considered necessary for the efficient management of the concern." Under such a rule it appears that one member may bind others by dealing on credit for the purpose of working the mines if it is necessary or usual in the course of such work, hiring employés and purchasing supplies; but he has no authority to borrow money or bind the partnership by a promissory note, and even though one be designated as managing agent or managing

92 Pac. 572; Dale v. Hodge, 110 Mo. App. 317, 85 S. W. 929; Anaconda Copper Min. Co. v. Butte & Boston Min. Co., 17 Mont. 519, 43 Pac. 924; Bentley v. Brossard, 33 Utah 396, 94 Pac. 736.

[45] Settembre v. Putnam, 30 Cal. 490; McIntosh v. Perkins, 13 Mont. 143, 32 Pac. 653.

[46] Dougherty v. Creary, 30 Cal. 290, 89 Am. Dec. 116.

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superintendent he has no other authority to bind the partnership than such as is conferred expressly or by necessary implication from his acts recognized by the company with full knowledge of their nature and scope, except upon such contracts as are usual and necessary in the ordinary prosecution of the work.[47] Each member has a lien upon the partnership property for debts due the creditors and for money advanced for the use of the company which he may enforce in equity even though there has been no agreement that such lien shall not exist.[48] While each partner is under no legal obligation to consult with the others in the disposal of his own interest or the purchase of another's interest, an incoming partner takes subject to the payment of antecedent partnership debts out of the partnership property, though he may not be held liable personally for such debts as in the case of an incoming member of a joint stock company; and a retiring partner by the transfer of his interest parts with his equitable lien upon the partnership property, but his personal liability to existing creditors continues[49] until he gives them actual personal notice of his retirement, and a mere silent withdrawal will not relieve such partner from liability in favor of persons subsequently dealing with the partnership.[50] It is therefore clear that while a mining partnership differs in a number of important particulars from a joint stock company, the only characteristics that distinguish it from an ordinary commercial partnership are such as result from the doctrine of delectus personæ inherent in the latter,[51] and it is of course competent for a general partnership to be formed by agreement of parties for the purpose of acquiring and working mines.

§ 1049. **Legal status.**—At common law all associations for commercial profit were either corporations created by a royal char-

[47] Congdon v. Olds, 18 Mont. 487, 46 Pac. 261.

[48] Childers v. Neely, 47 W. Va. 70, 34 S. E. 828, 49 L. R. A. 468, 81 Am. St. 777.

[49] Jones v. Clark, 42 Cal. 180.

[50] Dellapiazza v. Foley, 112 Cal. 380, 44 Pac. 727.

[51] Patrick v. Weston, 22 Colo. 45, 43 Pac. 446.

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ter or partnerships formed by the agreement of the parties composing them. The corporation usually embraced a large number of persons; the partnership but few; the former conducted its business through its officers or board of directors, in the latter the members of the firm as individuals acting together controlled all its affairs; the capital of the corporation was represented by shares transferable at the will of the owner and the members were relieved from individual liability beyond the corporate assets, that of the partnership was not so transferable and each partner was personally responsible for the whole of the partnership debts. About the beginning of the eighteenth century the opening of new fields of commercial enterprise gave rise to the organization of joint stock companies partaking of the nature of corporations in the number of persons associated and the transferability of interests, and of partnerships in their contractual character. The disastrous results of many speculative enterprises in which these companies engaged led to much controversy as to their status under the common law. The conflicting arguments concerning their legality at common law as stated in Lindley on Partnership were in substance as follows: On the one side it was contended that they were illegal because the privilege to have transferable shares could only be acquired by royal charter; and because they were dangerous and mischievous and hence contrary to public policy. To the first it was replied that no case could be found holding that a joint stock company having transferable shares was illegal at common law simply because it was unincorporated, nor was such a claim tenable on good reason. For it is not illegal for persons, however numerous, to enter into an ordinary contract of partnership; nor for them to agree when forming such partnership that any one of them may retire and introduce in his place any person selected by himself, nor for the retiring partner and his successor to agree upon the terms of such retirement and succession provided such terms are not in themselves illegal; nor for the membership of a partnership to assume a name and agree that its affairs shall be entrusted to a select few who shall have power to make rules which all shall

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obey. These propositions being assented to, establish the legality at common law of unincorporated joint stock companies with transferable shares. The claim that they were mischievous was said to rest upon a merely technical rule of pleading which required all the members of a partnership to be made defendants in an action against the firm. But a contract which imposes a liability upon a large number of persons is not invalid for that reason alone, and the rule of pleading which causes inconvenience in the enforcement of the contract should yield.[52] These arguments in favor of their legality prevailed and, though some adverse laws were enacted, legislation concerning joint stock companies assumed the form of measures declaratory of their power and liabilities, and recognizing them as legal. The culmination of such legislation was reached in the Companies Act of 1862, which, with its amendments, constitutes a complete system of laws upon this subject and as incorporation in England is difficult and expensive, unincorporated joint stock companies are a very common form of commercial associations. In this country joint stock companies are less frequently found, as the provisions for incorporation under general laws are such that parties may readily comply therewith and for the additional reason that limited partnerships may be formed so as to protect from indefinite loss. A joint stock company can not by its articles of association limit its own liabilities or those of its members to the rest of the world and become a corporation or a limited partnership by its own act and without regard to the formalities of the law, for the articles being a contract their terms can bind only parties thereto. These associations are as a general rule considered as being in the nature of partnerships and in the absence of express provisions are, in the main, governed by the same rules and principles which regulate ordinary general partnerships,[53] unless by

[52] Lindley Partnership (2d Eng. ed.), pp. 189-198.

[53] Clagett v. Kilbourne, 1 Black (U. S.) 346, 17 L. ed. 213; Bullard v. Kinney, 10 Cal. 60; Wadsworth v. Duncan, 164 Ill. 360, 45 N. E. 132; Edwards v. Warren Linoline Works, 168 Mass. 564, 47 N. E. 502, 38 L. R. A. 791; Butterfield v. Beardsley, 28 Mich. 412; McFadden v. Leeka, 48 Ohio St. 513, 28 N. E. 874.

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compliance with statutes regulating the formation of limited partnerships they bring themselves clearly within this class. Their common-law character and status is generally recognized since there can be no wrong to the public resulting from it, and as to the shareholders if they choose to purchase stock in a partnership with unlimited personal liability this is a privilege with which the law will not interfere.[54] A voluntary unincorporated association of individuals for pecuniary profit, whose proportions of ownership in the assets are represented by certificates similar to issues of corporate stock, is a partnership notwithstanding a rule limiting the distribution of profits among the certificate holders to a certain per cent., and such rule can not have the effect to relieve the shareholders from any part of their partnership liability to the firm's creditors.[55] Where a development corporation organized not for profit but to aid in the development of a city was not authorized to purchase land to be sold and used as a bonus to induce the location of manufacturing industries, the members of the association formed among themselves a syndicate to hold title to such property through a trustee and to use, improve and dispose of the lands for the development of the city and to provide a fund to secure the location of a factory, and upon the failure of the latter purpose the land was sold to a Chautauqua association and to a corporation owning adjoining property from which the subscribers realized a profit, it was held that the formation of the syndicate was not contrary to public policy, that its purpose was not limited to the establishment of manufacturing industries by making donations of land, but it had the power to use its assets generally for the improvement of the city and that the members of the syndicate were partners.[56] So where members of an unincorporated joint stock association

[54] Phillips v. Blatchford, 137 Mass. 510.

[55] Ashley v. Dowling, 203 Mass. 311, 89 N. E. 434, 133 Am. St. 296; Sheble v. Strong, 128 Pa. St. 315, 18 Atl. 397; Eliot v. Himrod, 108 Pa. St. 569

[56] Donald v. Guy, 127 Fed. 228; Hossack v. Ottawa Development Assn., 244 Ill. 274, 91 N. E. 439; Baltimore Trust &c. Co. v. Hambleton, 84 Md. 456, 36 Atl. 597, 40 L. R. A. 216.

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embarked in a common undertaking for their common profit which was sustained and agreed to be sustained by money advanced by each, their relation is such as to justify a court of equity, in order to settle their dispute respecting the distribution of a common fund, to treat them as partners.[57] Where one hundred and seven persons had united in an association for the purpose of carrying on a co-operative store and the articles of association provided that the business should be managed by a board of directors, a president, a vice-president and a managing agent, and that no goods should be bought or sold on credit, a suit was brought against all the members of the association upon a promissory note signed by the managing agent as such agent. Certain defendants claimed that the note given was for goods bought on credit in violation of the articles of association, and that if judgment was recovered execution should first be directed against the property of the directors. It was held that the relation of defendants was that of partners and the violation of the articles of association was no defense to the plaintiff's claim.[58]

§ 1050. **Taxation.**—A joint stock company created solely by agreement of the members and in which their individual rights and liabilities are not merged as in the case of a corporation, is not taxable on its capital as a stock corporation,[59] unless such association is expressly included in the statute.[60] The members are taxable as partners, and their shares are not subject to taxation under a statute as "stocks in a moneyed corporation."[61] The personal property of such company is liable to taxation in the place where its business is conducted and not, ordinarily, elsewhere;[62] but it has been held that such an association may be taxed for doing business in a state other than that where it was organized, under a statute imposing a tax on foreign corporations doing busi-

[57] Butterfield v. Beardsley, 28 Mich. 412; citing 3 Kent Commentaries, p. 26; Story Partnership, §§ 76, 164, 213; Brown v. Gilman, 4 Wheat (U. S.) 255, 4 L. ed. 564.

[58] Manning v. Gasharie, 27 Ind. 399.

[59] People v. Coleman, 133 N. Y. 279, 31 N. E. 96, 16 L. R. A. 183.

[60] People v. Wemple, 117 N. Y. 136, 6 L. R. A. 303.

[61] Hoadley v. Essex, 105 Mass. 519.

[62] Hoadley v. Essex, 105 Mass. 519.

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ness within the state.[64] Where the stock of such company has been taxed once to the company under the provisions of a statute, a shareholder can not be taxed with so much of it as he owns individually.[65]

§ 1051. Statutory provisions.—In many of the states laws have been enacted providing for the organization of joint stock companies, defining their powers and liabilities. The purpose and effect of compliance with these statutes is that the associations so formed retain their character as partnerships though they become vested with some of the powers and incidents of corporations,[66] such as perpetual succession; an artificial name in which they may make contracts, and take and hold real estate; a right to sue and be sued in such name or the name of an officer, and in some cases to have and use a common seal.[67] They are usually described in such statutes as "partnership associations" or "partnership associations limited," and are uniformly held not to be true corporations but rather in the nature of partnerships, notwithstanding their similarity in some respects to the former. In some states constitutional limitations preclude the organization of a joint stock company by a special act of the legislature conferring any powers or privileges not possessed by individuals or partnerships, and unless organized under the general law of corporations the common-law rule of liability of members prevails.[68] These statutes usually fix the minimum number of members varying from three to seven; provide for the transfer of shares and the succession of the transferee to membership and for the management of the business; prescribe the manner in which the company may sue and be sued; authorize the use

[64] Liverpool &c. L. &c. Ins. Co. v. Oliver, 10 Wall. (U. S.) 566, 19 L. ed. 1029.

[65] State v. Simmons, 70 Miss. 485, 12 So. 477.

[66] People v. Coleman, 133 N. Y. 279, 31 N. E. 96, 16 L. R. A. 183; Waterbury v. Merchants' Union Express Co., 50 Barb. (N. Y.) 157; Carter v. Producers Oil Co., 200 Pa. St. 579, 50 Atl. 167.

[67] Van Aernam v. Blustein, 102 N. Y. 355, 7 N. E. 537, 2 N. Y. St. 470.

[68] Sandford v. Supervisors of N. Y., 15 How. Pr. (N. Y.) 172; Spotswood v. Morris, 12 Idaho 360, 85 Pac. 1094.

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of a common seal in executing deeds, bonds and other instruments; and confer such other powers and impose such limitations as may be lawful. In general they require the articles of association to be made a matter of public record, and also a statement showing the name of the company, the character and location of the business, the names of the members, the amount of the capital stock, the shares held by each member, and such other facts as are necessary to disclose the nature of the organization. It is provided that the capital shall be paid in cash or property, and where property is contributed as a part of the capital there must be filed with the articles of association or as a part of the same, a schedule containing the names of those so contributing with a description of such property and a bona fide valuation upon it approved by all the subscribing members. The statement must enable parties to readily ascertain the kind, amount and value of property contributed and the terms upon which the association is formed.[69] In case of an omission of a schedule of the property contributed by the original subscribers, the contributions can not be treated as payments of capital stock so as to relieve such subscribers from personal liability to creditors; and a false statement will render them liable for fraud and enable a subsequent purchaser of stock to tender a return of the stock and recover the money paid for it.[70] One dealing with individuals as a partnership association limited is not estopped from denying its existence because of the failure to record the articles of association and may sue the individuals for fraud in inducing him to subscribe and pay for stock.[71] Another usual

[69] Stradley v. Cargill Elevator Co., 135 Mich. 367, 97 N. W. 775; Robins Electric Co. v. Weber, 172 Pa. St. 635, 34 Atl. 116; Haslet v. Kent, 160 Pa. St. 79, 28 Atl. 501.

[70] Macomber v. Endion Grape Juice Co., 160 Mich. 54, 125 N. W. 26; Haslet v. Kent, 160 Pa. St. 85, 28 Atl. 501; Gearing v. Carroll, 151 Pa. St. 79, 24 Atl. 1045; Laflin & Rand Powder Co. v. Steytler, 146 Pa. St. 434, 23 Atl. 215, 14 L. R. A. 690; Appeal of Hite Natural Gas Co., 118 Pa. St. 436, 12 Atl. 267; Appeal of American Tube & Iron Co., 118 Pa. St. 436, 12 Atl. 267; Maloney v. Bruce, 94 Pa. St. 249.

[71] Elgin Nat. Watch Co. v. Loveland, 132 Fed. 41; Nichols v. Buel, 157 Mich. 609, 122 N. W. 217; Doyle

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statutory provision forbids the incurring of debts on behalf of the association in excess of a sum named in the statute unless reduced to writing and signed by at least two managers. An agreement not conforming to this requirement is a nullity and not binding on either party.[73] Under these statutes the personal liability of members for the debts of the association can not be enforced until the assets of the company are exhausted[73] and usually extends only to the amount of unpaid subscriptions. In all matters pertaining to the organization, powers and liabilities of such an association and its members, the statutory provisions of the state where it is organized will receive full recognition in the courts of other states, but the rules of procedure in cases to which it is a party must be determined by the law of the state where the action is brought.[74] The constitutional and statutory provisions above referred to frequently use the term "corporations" as embracing voluntary associations and joint stock companies and hence the courts sometimes speak of them as quasi corporations partaking of the nature of limited partnerships,[75] but it seems that such provisions do not warrant the recognition of any intermediate form of organization between a corporation and a partnership and the legal status of such associations is not materially changed. They are still essentially partnerships, though limited.[76]

§ 1052.—Articles of association or constitution and by-laws. —The articles of association are on the one hand like articles of partnership, creating by agreement a relation between the parties giving rise to legal obligations to others which are necessary

v. Mizner, 42 Mich. 332, 3 N. W. 968; Fredenburg v. Lyon Lake M. E. Church, 37 Mich. 476.

[73] Dickinson v. Matheson Motor Car Co., 161 Fed. 874; Hoyt v. Paw Paw Grape Juice Co., 158 Mich. 619, 123 N. W. 529.

[73] Bastrop and Austin Bayou Rice Growers' Assn. v. Cochran (Tex. Civ. App.), 171 S. W. 294.

[74] Story Conflict of Laws, §§ 556, 568, and cases there cited.

[75] Briar Hill Coal Co. v. Atlas Works, 146 Pa. St. 290.

[76] Davison v. Holden, 55 Conn. 103, 10 Atl. 515, 3 Am. St. 40; People v. Empire Insurance Co., 88 Ill. 309; Ricker v. American Loan & Trust Co., 140 Mass. 346, 5 N. E. 284.

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incidents to the relation; and on the other hand like the charter of a corporation in the provisions made for the conduct of the business. They regulate the rights, duties and obligations of the members among themselves, specify the amount of capital and the character of the contributions thereto, limit the duration and define the business of the association, provide for its internal organization, prescribe and define the duties and powers of the officers, and as touching all matters of this character are conclusive upon the members.[77] They may limit the liability to be assumed by the association, provide that officers shall not dispose of any property of the association without concurrence of shareholders;[78] and being in the nature of a contract no change can be made in them without the unanimous consent of the shareholders.[79] They must therefore be executed or assented to by all the original members and a subsequent purchaser of shares is bound to know their provisions and by his admission to membership in the association becomes a party thereto acquiring the rights and assuming the duties and obligations created by them.[80] The statements in these articles of the intention of the parties as to the legal character of the association and the legal liabilities which they intend to assume as members are not conclusive,[81] but the courts will construe the articles themselves and determine the legal effect.[82] The agreement of the parties is often expressed in the form of a constitution and by-laws, the former being the fundamental or primary agreement expressed in comprehensive terms to which the latter are in a certain sense auxiliary, providing specific means for giving effect to the agreement. It is

[77] Bray v. Farwell, 81 N. Y. 600.

[78] Spotswood v. Morris, 12 Idaho 360, 85 Pac. 1094, 6 L. R. A. (N. S.) 665.

[79] Livingston v. Lynch, 4 Johns. Ch. (N. Y.) 573.

[80] Logan v. McNaugher, 88 Pa. St. 103.

[81] Beecher v. Bush, 45 Mich. 188, 7 N. W. 785, 40 Am. Rep. 465.

[82] Strang v. Osborne, 42 Colo. 187, 94 Pac. 320. "The court in determining whether a trust or a partnership was created (by the articles of agreement) will consider what the parties did, and will not consider what they intended to do, unless there is a doubt as to what they did." Williams v. Milton, 215 Mass. 1, 102 N. E. 355, where will be found a full review of Massachusetts decisions.

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possible for the constitution which has the unanimous consent of the members to provide for the exercise of powers by a certain portion of the membership or by certain officers, if such provision does not conflict with any established rule of law. The courts have declared valid provisions for the election of directors to fill vacancies by the board of directors and authorizing an election of directors by the stockholders only on petition therefor signed by the holders of two-thirds of the stock, though they make the board a self-perpetuating body, on the ground that they tend to secure stability in the management.[83]

§ 1053. Membership and its incidents.—When a question arises as to what constitutes membership in a joint stock company it must be referred to the general principles of partnership as applied to the agreement or relation of the parties, or to the terms of the articles themselves, or to such local statutory provisions as may exist in reference to the organization. Subscribing to the capital of an intended company and even a payment of the first deposit does not of itself constitute one a member of a partnership.[84] For it is evident that when the first subscriber signs his name he is not a partner, for there is no other who has entered into the relation with him; and when any number have so signed, the relation of partnership is not formed until something is done to effect their common purpose. The contract is only executory and the relation of partnership is not established until the parties show the fact by acts of mutual participation in the undertaking.[85] And as the formation of a joint stock company requires a number of acts before the partnership is actually commenced, such as publishing notices, holding meetings, paying deposits, issuing certificates, many acts are done before the full number of subscribers has been secured; and they merely show an intention to form an association or at most are but steps toward its formation. If, however, one takes part in the transac-

[83] Spraker v. Platt, 158 App. Div. 377, 143 N. Y. S. 440.

[84] Parsons Contracts, ch. 11, p. 144, and cases there cited.

[85] Hedge's Appeal, 63 Pa. St. 273.

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tion of the business of the company, acts and is treated by his associates as a member, he is at common law to all intents and purposes a member, although he may not have complied with the terms of the constitution as by signing it.[86] Since an organization under statutory provisions can not be complete until all requirements have been complied with, no valid association is created and there can be no membership until the statutory conditions are met. When such acts are complete they can of course bind only those who have consented by participation in them. So far as the other parties to the enterprise are concerned, signing the subscription to capital stock may make one a partner,[87] and every subscriber or contributor with intent to share in the profits is chargeable with the liabilities, and this intent may be shown by an unexplained subscription or contribution, serving on board of directors, or taking part in business transacted in meetings of the company.[88] The foregoing statements apply with especial force to original membership. The relation of subsequent purchasers of stock may be subject to other conditions expressed in the terms of the certificate issued and of the articles of association. Where the certificate recites that by its acceptance the holder becomes a member subject to the terms of the articles and amendments thereto, a purchaser and the shares so purchased are subject to such provisions as if he were one of the original members.[89] Where persons organized a co-operative store, the shares of each being represented by stock, it was held that payment for stock made the purchaser a partner though he never received a certificate, nor attended a meeting of the association, nor had knowledge of the firm's business, such payment being a sufficient participation in the company's affairs to indicate his assent thereto.[90] And one may, by holding himself out as a member and receiving benefits flowing from the ownership of shares,

[86] Tyrrell v. Washburn, 88 Mass. 466.

[87] Frost v. Walker, 60 Maine 468; Boston & Albany R. Co. v. Pearson, 128 Mass. 445.

[88] Hunnewell v. Willow Springs Canning Co., 53 Mo. App. 245.

[89] Spraker v. Platt, 158 App. Div. 577, 143 N. Y. S. 440.

[90] Ashley v. Dowling, 203 Mass. 311, 89 N. E. 434.

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make himself liable for debts though the formalities required to entitle him to the rights and privileges of membership have not been observed. Membership imposes upon the shareholders a personal liability as partners for the debts of the association, either general or as limited by statute, except when there is an agreement with the creditor for payment from a particular fund[91] or the contracts are drawn so as to confine liability to the assets of the association and thus create the same situation as to their rights and liabilities thereunder as if the joint stock association were a corporation and its members were stockholders.[92] A member, therefore, in the absence of such limitations, paying a company debt, pays his own debt and can not, by taking an assignment to himself, keep a lien alive,[93] nor make a profit.[94] The indebtedness of the company is as between the members chargeable pro rata to the solvent members[95] and those paying the entire indebtedness or amounts in excess of their proportionate share are entitled to contribution by their associates. Members are, with the association, bound by the acts of the officers within the scope of their authority,[96] but they are not personally liable for tortious acts of the company or its officers unless they participate in them.[97] Where an association of persons having negotiable shares purchased property and the deed was subsequently canceled for fraud, and an accounting to the grantor for the proceeds of a portion sold was decreed, all members at the times of such sales are such participants as to be liable as partners.[98] The mutual dealings of the members are subject to close scrutiny by the courts and their interests are carefully protected. Though each is bound by the terms of the articles of as-

[91] McDowell v. Joice, 149 Ill. 124, 36 N. E. 1012; Baltimore Trust Co. v. Hambleton, 84 Md. 456, 36 Atl. 597, 40 L. R. A. 216.

[92] Hibbs v. Brown, 112 App. Div. 214, 98 N. Y. S. 353.

[93] Hardy v. Norfolk Mfg. Co., 80 Va. 404. But see Romona Oolitic Stone Co. v. Bolger, 179 Fed. 979.

[94] Coleman v. Coleman, 78 Ind. 344.

[95] Cameron v. First Nat. Bank (Tex. Civ. App.), 34 S. W. 178.

[96] Wadsworth v. Duncan, 164 Ill. 360, 45 N. E. 132; Lewis v. Tilton, 64 Iowa 220, 19 N. W. 911; Laney v. Fickel, 83 Mo. App. 60.

[97] Whitney v. Backus, 149 Pa. St. 29, 24 Atl. 51.

[98] Snow v. Hizeland, 179 Fed. 182, 102 C. C. A. 448.

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sociation and by-laws he is not precluded from enforcing against his co-members a just claim.[99] An action at law can not be maintained by a member against others in respect to their mutual rights, but adjustment being sought in a court of equity an accounting or other relief will be decreed when the affairs of the company require it.[1] In respect to dealings between the company and the members there is authority for the statement that the company can contract as an "individualized and unified party" with an individual member thereof as effectually as a corporation can contract with one of its stockholders, and that the only difference is a technical one of procedure.[2] It is plain that such companies have some of the powers and privileges of corporations and that the tendency of statutory regulations is to confer upon them more of the character of incorporated bodies.[3] They can not, however, by their power to contract with members, confer upon a shareholder or any particular class of shareholders an advantage over others in the distribution of profits and assets.[4] A member who sells property to the association at current market prices is not required to account for profits on such sale; and one who makes advances for the company beyond his agreed contribution is entitled to interest at the legal rate.[5] It is the right of such shareholder to be informed of the condition of the company affairs and he may obtain authority from a court of equity to inspect the books and records of the association when such examination is necessary and for a proper purpose.[6] The articles of association or rules adopted in pursuance of them may provide for the levy of assessments upon the shares of the members for purposes necessary for the proper conduct of the

[99] McCarty v. Caledonia Coal Co., 164 Mich. 692, 130 N. W. 207.

[1] Hogg v. Hoag, 154 Fed. 1003, 83 C. C. A. 677; Smith v. Fagan, 17 Cal. 178; Clark v. Reed, 11 Pick. (Mass.) 446; Marston v. Durgin, 54 N. H. 347; Carter v. Producers Oil Co., 164 Pa. St. 463, 30 Atl. 391.

[2] Walker v. Wait, 50 Vt. 668.

[3] Westcott v. Fargo, 61 N. Y. 542, 19 Am. Rep. 300.

[4] Gardiner v. Gardiner, 212 Mass. 508, 99 N. E. 171.

[5] Mack v. Engle, 165 Mich. 540, 131 N. W. 92.

[6] In re Hatt, 57 Misc. 320, 108 N. Y. S. 468.

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business and the collection of assessments will be enforced, but no levy can be made before the entire stock is taken unless the articles expressly provide for it.[7] It may be stated as a general principle the membership involves an observance of all rules and regulations legally adopted by the association, for to these each has necessarily assented and can claim no right or be subjected to burdens which do not flow from his agreement. Membership may be terminated by withdrawal in the manner prescribed by the articles of association. Where such articles provided that "the by-laws can be amended only by a two-thirds majority of all the stock held," no member or members holding a less amount of stock could withdraw while continuing to hold his interest in the property which the company was organized to manage, for this would abrogate or amend the articles in direct violation of their provisions.[8] The sale of his stock by a member and a withdrawal as allowed by the by-laws, though he has been unable after repeated efforts to obtain a transfer of the stock on the books of the association, relieves of all liability to other members by virtue of their membership relation, and to persons dealing with the association thereafter to whom his former connection with it was not known at the time of such transaction.[9]

§ 1054. Organization—Meetings and elections.—For the complete organization of the company provision must be made for meetings of stockholders, the election of officers and the transaction of the business. Where these matters are regulated by statute it is generally provided that an annual meeting shall be held at such time and place as the by-laws may direct,[10] and that the officers shall be chosen at such meetings by a vote of the stockholders. This provision does not govern the choice of the first set of officers whose election immediately upon the forma-

[7] Bray v. Farwell, 81 N. Y. 600.

[8] Strang v. Osborne, 42 Colo. 187, 94 Pac. 320.

[9] Norwood v. Francis, 25 App. D. C. 463.

[10] Stradley v. Cargill Elevator Co., 135 Mich. 367, 97 N. W. 775; Wells v. Rodgers, 60 Mich. 525, 27 N. W. 671; Jennings v. Beale, 146 Pa. St. 125, 23 Atl. 225; Consult state statutes.

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tion of the company is necessary, but it applies to all subsequent elections.[11] Personal notice in writing to the members of the time and place of such meeting is required unless some other method is provided in the articles or by-laws,[12] and an election can not be legally held without the meeting or at least notice to all shareholders.[13] The law presumes, in the absence of any proof to the contrary, that the proper notice was given, when a quorum are present at the meeting;[14] and the mere fact that all of the members of the board of managers are not present at a special board meeting does not raise a presumption that the meeting was irregular.[15] A statute securing to a minority of the stockholders of a corporation the power to elect a representative in the board of directors, and providing for cumulative voting of stock, is not applicable to an election of managers of a joint stock company, unless it is made so in terms.[16] The articles of association may also declare who may be eligible to the offices[17] and the election of persons who have not the prescribed qualifications may justify a decree declaring the election void.[18] Directors' meetings and special meetings may be held at such times and upon such conditions, and may exercise such powers, as the rules of the company may provide. A holder of shares has the right to empower, by proxy or otherwise, another subscriber to cast his vote at an election to fill a vacancy in the board of directors, and no statutory authority is necessary.[19]

§ 1055. Capital stock—Issue and transfer of certificates.—The capital stock may consist of contributions of cash or of prop-

[11] Boston Acid Mfg. Co. v. Moring, 81 Mass. 211.

[12] Wiggin v. First Freewill Baptist Church in Lowell, 49 Mass. 301; Stradley v. Cargill Elevator Co., 135 Mich. 367, 97 N. W. 775; Irvine v. Forbes, 11 Barb. (N. Y.) 587.

[13] Irvine v. Forbes, 11 Barb. (N. Y.) 587.

[14] Wells v. Rodgers, 60 Mich. 525, 27 N. W. 671.

[15] Stradley v. Cargill Elevator Co., 135 Mich. 367, 97 N. W. 775.

[16] Attorney-General v. McVichie, 138 Mich. 387, 101 N. W. 552.

[17] Dudley v. Platt, 118 N. Y. S. 1058.

[18] Spraker v. Platt, 158 App. Div. 377, 143 N. Y. S. 440; People v. Koring, 133 App. Div. 756, 118 N. Y. S. 136.

[19] Spraker v. Platt, 158 App. Div. 377, 143 N. Y. S. 440.

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erty at a fair and reasonable valuation, and in the absence of fraud an excessive valuation does not vitiate the organization,[20] but the property must not be subject to indebtedness or liens, for the schedule of assets must inform creditors of its true value. Payment of stock in the notes of a third person is not sufficient to effect a legal organization, since their value is not certain. The consideration for the promise of a subscriber to the capital stock is a like promise by other subscribers.[21] Each subscriber assumes a several obligation and is bound to pay[22] unless the subscription to the whole number of shares is made a condition precedent to such payment.[23] The undertaking is trilateral between the individual subscriber, the company and the other subscribers, and though fraudulent as between two of the parties may be enforced for the benefit of the third,[24] and if a subscription is made payable in calls made by trustees an action at law will lie to enforce such promise.[25] A material departure from the agreement under which a subscription is made, as where the majority organize a corporation instead of a joint stock company, invalidates the subscription for want of privity of contract.[26] The subscriber is not entitled to rescind because of misrepresentation as to the amount of cash capital made to induce him to subscribe when not relied upon by him, or the fact that the company did not acquire a valid title to all the property specified in the articles or that the business of the company proves unsuccessful,[27] nor are the subscriber's individual obligations to the company as a shareholder avoided by the fact that after receiving his certificates he holds a controlling interest.[28] Upon

[20] Rehfuss v. Moore, 134 Pa. St. 462, 19 Atl. 756, 7 L. R. A. 663.

[21] Kimmins v. Wilson, 8 W. Va. 584.

[22] Haynes v. Kent, 8 La. Ann. 132.

[23] Sandford v. Halsey, 2 Denio (N. Y.) 235.

[24] Altoona Sanitary Milk Co. v. Armstrong, 38 Pa. Super. Ct. 350.

[25] Glover v. Tuck, 24 Wend. (N. Y.) 153.

[26] Knottsville Roller Mill Co. v. Mattingly, 18 Ky. L. 246, 35 S. W. 1114; Machias Hotel Co. v. Coyle, 35 Maine 405, 58 Am. Dec. 712.

[27] Wright v. Swayne, 44 Ky. 441; Andrews v. Brace, 154 Mich. 126, 117 N. W. 586.

[28] Hogg v. Hoag, 154 Fed. 1003, 83 C. C. A. 677.

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compliance with the conditions imposed by the articles or by statute in reference to contributions to capital stock a subscriber is usually entitled to have a certificate issued which represents a proportionate interest in the property of the company which equity will protect, though the capital be only nominal, and which may be sold and transferred by the owner.[29] On the other hand equity will, as between the subscriber and its promoters, cancel a certificate of stock in an alleged partnership association on the ground of fraud which induced its purchase.[30] In the absence of statutory provisions or restrictions in the articles of association shares may be transferred at the will of the holder and the purchaser succeed to membership with its incident rights and obligations. If the manner of transfer is prescribed there must be a compliance therewith before the assignee may become a member,[31] but the transfer may entitle him to such an interest in the property as the certificates received represent as against the assignor and his attaching creditors, though the rules declare that no change of ownership can be accomplished in any other mode or form than as specified.[32] If by the articles of agreement the certificate of shares is to carry with it an undivided right in the property of the company, a subsequent bona fide purchaser's right to a ratable share of proceeds of sale of such property is not affected by the fact that he has never subscribed to the articles.[33] And where the certificates recite that the person to whom they were issued is entitled to shares in "the equity of the property held by the trustees transferable only on the books of said trustees on surrender of this certificate," a purchaser may compel a transfer on the books by showing affirmatively a compliance with the requirements.[34] While it appears

[29] Durkee v. Stringham, 8 Wis. 1.

[30] Nichols v. Buell, 157 Mich. 609, 122 N. W. 217.

[31] Near v. Donnelly, 80 Mich. 130, 44 N. W. 1118; Kingman v. Spurr, 7 Pick. (Mass.) 235; Rice v. Rockefeller, 134 N. Y. 174, 31 N. E. 407, 17 L. R. A. 237, 30 Am. St. 658.

[32] Globe Refining Co.'s Estate, 151 Pa. St. 558, 25 Atl. 128; Tide Water Pipe Co. v. Kitchenman, 108 Pa. St. 630.

[33] Butterfield v. Beardsley, 28 Mich. 412.

[34] Rice v. Rockefeller, 134 N. Y. 174, 31 N. E. 407, 17 L. R. A. 237, 30 Am. St. 658; Cushman v. Thayer Mfg. Jewelry Co., 76 N. Y. 365.

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that the nonobservance of mere formalities will not be permitted to affect the substantial property rights of a shareholder[35] a provision in the certificate making its transfer depend upon the consent of certain officers of the association imposes a condition precedent to an action to compel the company to account.[36] The effect of the transfer when legally completed as concerns the company is to discharge the assignor from liability for its debts —and this though the mode prescribed be not pursued if the company recognizes the assignee as a member and ceases to regard the assignor as such.[37] Mere irregularities if openly and tacitly allowed do not invalidate the transfer. The assignor remains liable to creditors for existing debts of the company and the assignee becomes liable for those incurred after the assignment.[38] A member who has in good faith transferred his stock and withdrawn from the association and who is later compelled to pay company debts, is entitled to reimbursement from the company and the new members.[38a] A certificate of stock may also be assigned and delivered to pledge the property thereby represented as collateral security for a debt, and this delivery effects a change of possession of such property when not itself susceptible of delivery.[39] One may not only part with his shares by voluntary transfer, but the articles or by-laws may provide conditions upon which the company or its authorized officers may declare a forfeiture. Provisions of this character will, however, be strictly construed in favor of the shareholder and all conditions precedent must be observed or the forfeiture is void,[40] and usually a mere declaration of forfeiture by the board of directors is not sufficient. If his shares are wrongfully forfeited he may sue for reinstatement, or he may recover the value of his shares but his stock will remain liable to the company's debts and losses until

[35] Alvord v. Smith, 22 Mass. 232.

[36] Kingman v. Spurr, 7 Pick. (Mass.) 235.

[37] Wells v. Wilson, 3 Ohio 425, 428.

[38] Rianhard v. Hovey, 13 Ohio 300.

[38a] Savage v. Putnam, 32 N. Y. 501, (affg. 32 Barb. 420).

[39] Citizens Bank of Ft. Scott v. Bank of Commerce, 80 Kans. 205, 101 Pac. 1005.

[40] Morris v. Metalline Land Co. of Lake Superior, 166 Pa. St. 351, 31 Atl. 114.

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dissolution.[41] Dividends are not of the essence of a joint stock company, for it may be so organized that it is to continue for a designated time, and upon its dissolution the entire assets to be distributed among the shareholders in proportion to their respective interests. When declarations of dividends are provided for and a dividend is declared the shareholder is entitled to payment on demand.[42] Under authority to declare dividends out of profits the managers have no right to declare dividends out of all the company's assets.[43] A shareholder may, in an action for accounting, compel a distribution of net profits as dividends.[44] The company is bound to pay dividends to true owner only, hence if an illegal transfer has been made upon the books and the rightful owner does not know who is the holder, a bill for accounting will lie.[45] Unpaid dividends are assets liable for the debts of the company as against the claim of the shareholder.[46]

§ 1056. **Property and funds.**—There is no inherent right in a joint stock association to have, hold, and convey real estate. This power, when possessed, is conferred by statute and is usually limited to such realty as may be necessary for the immediate needs of the company in transacting its business, and such as is held under mortgage as security for loans, and that purchased at sales under judgments and decrees held by it.[48] The right of the company to hold real estate conveyed to it can only be questioned, however, by the state. The statute of Idaho provides that a joint stock company may be formed by individuals for the purchase of a single tract of real estate, the title to which may be taken in a trustee.[49] An attempt to convey to an associa-

[41] Lesseps v. Architect Co., 13 La. 414.

[42] Keppel v. Petersburg R. Co., Fed. Cas. No. 7722, Chase 167.

[43] Bishop v. Bishop, 81 Conn. 509, 71 Atl. 583.

[44] Taber v. Breck, 192 Mass. 255, 78 N. E. 472; Howe v. Morse, 174 Mass. 491, 55 N. E. 213.

[45] Southwestern R. Co. v. Thomason, 40 Ga. 408.

[46] Curry v. Woodward, 44 Ala. 305.

[48] Byam v. Bickford, 140 Mass. 31, 2 N. E. 687; Bartlet v. King, 12 Mass. 537, 7 Am. Dec. 99; Howell v. Earp, 21 Hun (N. Y.) 393.

[49] Spotswood v. Morris, 12 Idaho 36, 85 Pac. 1094, 6 L. R. A. (N. S.) 665.

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tion not authorized to take realty will vest the title in the grantees named in the conveyance, who will hold it as tenants in common.[50] Where an association is organized for the purpose of buying and selling realty through trustees they take and hold the same as joint tenants in trust for the members[51] who, as individual shareholders and not as a collective body, are entitled in equity to the property.[52] And where the purchase-price of land is paid out of the funds of the company the outstanding certificates may be regarded as an equitable lien on the land.[53] The control of the property and funds is in the association itself though it act through its officers or trustees. A deed executed by the association in a legal manner or one executed by all the individual members and stockholders is equally effective to convey title.[54]

§ 1057.—Power to make contracts.—The capacity to make contracts is a necessary incident of the legal entity of the association without which the purpose of its existence would be defeated. This power is vested primarily in the board of directors alone, from whom authority must be derived. A member of the association has no general authority by virtue of his membership to bind the company by his contracts.[55] The directors may bind the company for a loan without special authority, as this is a necessary result of their power to make contracts, but any other officers of the association must have authority from the directors.[56] Officers who make unauthorized contracts can

[50] Bryan v. Bickford, 140 Mass. 31, 2 N. E. 687; Hunt v. Wright, 47 N. H. 396, 93 Am. Dec. 451.

[51] Clagett v. Kilbourne, 1 Black (U. S.) 346, 17 L. ed. 213; Barker v. White, 58 N. Y. 204; Morris v. Metalline Land Co., 166 Pa. St. 351, 31 Atl. 114.

[52] Crawford v. Gross, 140 Pa. St. 297, 21 Atl. 356.

[53] Crawford v. Gross, 140 Pa. St. 297, 21 Atl. 356.

[54] Richmond Cedar Works v. Pinnix, 208 Fed. 785.

[55] McConnell v. Denver, 35 Cal. 365, 95 Am. Dec. 107; Spotswood v. Morris, 12 Idaho 360, 85 Pac. 1094, 6 L. R. A. (N. S.) 665; Vattier v. Roberts, 2 Blackf. (Ind.) 255; Berry v. Hooper, 179 Mich. 67, 146 N. W. 275; McCain v. Smith, 172 Mich. 1, 137 N. W. 616.

[56] Dickinson v. Matheson Motor Car Co., 161 Fed. 874; Ashley v. Dowling, 203 Mass. 311, 89 N. E. 434;

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not ratify them,[57] but the company may ratify by accepting the proceeds,[58] or bringing suit thereon.[59] Neither can officers have contribution or indemnity from other stockholders when in violation of a by-law they contract beyond the available capital.[60] The power of directors to make contracts may be limited by statute or by the articles of association. If so, they render themselves personally liable if they exceed their authority; but if the other contracting party has notice of the limitation of their authority the association is not liable unless the act is subsequently ratified.[61] A director of a joint stock company may make a valid contract with the company of which he is a member, provided in doing so, he deals fairly and honestly toward the stockholders who have appointed him their agent.[62]

§ 1058. Actions by and against joint stock companies.— As a joint stock company is usually in contemplation of law, a partnership, all the members are, in the absence of statutory provisions, necessary parties to actions by or against the association. And for the same reason a member can not, under like conditions, maintain an action against the company or be sued by it in a court of law. The inconvenience and hardship resulting from these principles have led to their modification by remedial statutes providing that such associations may sue and be sued in the name of the company or of such officer as may be designated by the statute, who for the purpose of the action is the representative of the whole company as distinct from the individuals composing it.[63] These provisions are permissive only and do

Wells v. Wilson, 3 Ohio 425; Cameron v. First Nat. Bank, 4 Tex. Civ. App. 309, 23 S. W. 334.

[57] Hotchin v. Kent, 8 Mich. 526.

[58] MacGeorge v. Harrison Chemical Mfg. Co., 141 Pa. St. 575, 21 Atl. 671.

[59] Park v. Kelley Axe Mfg. Co., 49 Fed. 618, 1 C. C. A. 395.

[60] McFadden v. Leeka, 48 Ohio St. 513, 28 N. E. 874.

[61] Hotchin v. Kent, 8 Mich. 526; Humphreys v. New York &c. R. Co., 121 N. Y. 435, 24 N. E. 695; Mercantile Nat. Bank v. Lauth, 143 Pa. St. 53, 21 Atl. 1017; Pittsburg Melting Co. v. Reese, 118 Pa. St. 355, 12 Atl. 362; Willis v. Greiner (Tex.), 26 S. W. 858.

[62] Twin-Lick Oil Co. v. Marbury, 91 U. S. 587, 23 L. ed. 328; Barr v. Pittsburg Plate Glass Co., 57 Fed. 86, 6 C. C. A. 260.

[63] Adams Express Co. v. Schofield,

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not prevent actions by or against the members as partners and being in derogation of the common law must be strictly construed.[64] As procedure in such actions is by no means uniform, and that of the forum must always be pursued, only general statements are here presented. By virtue of statutory provisions in some jurisdictions a joint stock company may be sued by a member and it may sue a member. Thus it has been held that the president of such company may maintain a suit against its treasurer to recover the funds belonging to the company.[65] An action against such an association should generally be brought in the county where the principal office or place of business named in the articles of association is located, and service of process should be upon the officer designated by law (not merely by the association itself) to appear in its behalf; but it is usually provided that if such officer does not reside in that county or is not found there and served with process within a limited time service may be had upon a clerk, agent or attorney of the company found at such place of business. The classification of a company by the statutes of the jurisdiction in which it is organized is not conclusive in other states,[66] hence in foreign jurisdictions process may be served as upon a corporation when the association has substantially corporate powers.[67] The pleadings should show affirmatively the representative character of the officer maintaining or defending the action, and an adverse judgment will not be enforcible against him personally. The execution issued thereon must be levied on the property belonging to the

111 Ky. 833, 64 S. W. 903, 23 Ky. L. 1120; People v. Wemple, 117 N. Y. 136, 22 N. E. 1046, 6 L. R. A. 303; Van Aernam v. Blustein, 102 N. Y. 355, 7 N. E. 537, 2 N. Y. St. 470; National Bank v. Van Derwerker, 74 N. Y. 234; Wescott v. Fargo, 61 N. Y. 542, 19 Am. Rep. 300; Olery v. Brown, 51 How. Pr. (N. Y.) 92; Platt v. Colvin, 50 Ohio St. 703, 36 N. E. 735; McGeorge v. Chemical Mfg. Co., 141 Pa. St. 575, 21 Atl. 671.

[64] King v. Randlett, 33 Cal. 318.

[65] Strebe v. Albert, 1 City Ct. (N. Y.) 376.

[66] Liverpool Ins. Co. v. Massachusetts, 10 Wall. (U. S.) 566, 19 L. ed. 1029.

[67] State v. Adams Express Co., 66 Minn. 271, 68 N. W. 1085, 38 L. R. A. 225; Express Co. v. State, 55 Ohio

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association or owned by the members jointly or in common.[68] If the return of the execution shows the judgment remains wholly or partially unsatisfied, the judgment creditor may then maintain an action against the members upon the original claim on their personal liability as partners, and upon obtaining judgment enforce it against their individual property.

§ 1059. **Dissolution.**—A dissolution of a joint stock company, the settlement of its affairs and distribution of the assets may be effected by several methods. (1) Being a creature of contract, the association may be dissolved by the mutual consent of all the members and the appointment of trustees to wind up the business.[69] (2) The original organization may be dissolved by the shareholders forming a corporation in which they become stockholders as their interests appear. Such reorganization does not relieve them from personal liability for debts contracted when they were a joint stock company.[70] (3) The insolvency of the association is ground for its dissolution by the court upon petition of members or creditors and the appointment of a receiver to take charge of its property and apply the same to the payment of debts. He may maintain actions against all debtors including stockholders, but he can not call upon shareholders for unpaid subscriptions until the court has determined the amount of indebtedness and fixed the liability of each share of stock.[71] No creditor who is a stockholder in an insolvent joint stock company can share in the distribution until the other creditors are paid in full.[72] The assets must be applied pro rata on all the indebtedness and where notes given by the company are indorsed

St. 69, 44 N. E. 506; State v. United States Express Co., 2 Ohio S. & C. P. Dec. 257, 1 Ohio N. P. 259.

[68] Metropolitan St. R. Co. v. Adams Express Co. (Mo. App.), 130 S. W. 101.

[69] Morris v. Imperial Cap Co., 135 Mich. 476, 98 N. W. 5; Francis v. Taylor, 31 Misc. 187, 65 N. Y. S. 28.

[70] Beaman v. Whitney, 20 Maine 413; Frank v. Drinkhahn, 76 Mo. 508; Arthur v. Weston, 22 Mo. 378; Durham Fertilizer Co. v. Clute, 112 N. Car. 440, 17 S. E. 419; Broyles v. McCoy, 5 Sneed (Tenn.) 602.

[71] Chandler v. Keith, 42 Iowa 99; Lewis v. McElvain, 16 Ohio 347.

[72] Bain v. Clinton Loan Assn., 112 N. Car. 248, 17 S. E. 154.

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by stockholders and secured by mortgage on all the property of the copartnership they must be treated as other obligations are—receiving their due share.[73] (4) If one person acquires all the stock it becomes property in severalty and the joint ownership is dissolved.[74] (5) A court of equity will, for cause, decree a dissolution and appoint a receiver upon a bill presented by shareholders or creditors. And in a suit for an accounting, if all parties in interest ask for a dissolution and the court considers it to be for their best interests, a dissolution will be allowed though the association as such is not a party to the proceeding.[75] The willingness of the officers or many subscribers to close out the business of a company whose articles fix a definite time for its duration is not a ground for dissolution at an earlier date when its continuance will, in the opinion of the court, subserve the best interests of the shareholders.[76] Where a dissolution is sought on the ground of mismanagement it must be shown that some actual loss to the parties in interest has resulted therefrom or that those in charge are acting in bad faith. Irreconcilable difficulties between stockholders and the managament; violations of the articles by the directors in which the shareholders have acquiesced for a number of years; failure to have a call issued for a meeting of stockholders where the articles provided that no such meeting could be called except on the request of the holders of two-thirds of the shares have been considered not to be grounds for a dissolution where there is nothing to show that the association has suffered from these acts or omissions.[77] To warrant a dissolution upon the ground of fraud it must be such as would defeat the rights of shareholders in violation of the articles of association, or when those in charge are converting the assets or profits to their own personal benefit.[78] (6) The affairs of the

[73] Lipsett v. Hassard, 158 Mich. 509, 122 N. W. 1091.

[74] Butterfield v. Beardsley, 28 Mich. 412; Farnum v. Patch, 60 N. H. 294, 49 Am. Rep. 313.

[75] Mack v. Engel, 165 Mich. 540, 131 N. W. 92.

[76] Hossack v. Ottawa Development Assn., 244 Ill. 274, 91 N. E. 439

[77] Dudley v. Platt, 118 N. Y. S. 1058.

[78] Randolph v. Nichol, 74 Ark. 93, 84 S. W. 1037; Colton v. Raymond, 114 App. Div. 911, 100 N. Y. S. 111; Snyder v. Lindsey, 92 Hun 432, 36 N. Y. S.

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company may always be closed up in accordance with the articles of association.[79] If a definite time for its duration is named in the articles the association can not be kept alive without the unanimous consent of the shareholders. If a distribution of assets is not made upon the termination of such time a receiver will be appointed for that purpose. Upon dissolution the trustees holding the property, or the receiver, if one has been appointed, must convert the assets into money and after payment of company debts distribute the proceeds among the shareholders.[80] Where a joint stock company was organized under an agreement that the death of a member should not work a dissolution, it was held that upon the death of a member the legatees or distributees of the deceased could not require a division of the assets, but that they were entitled to succeed to the shares.[81]

1037, 72 N. Y. St. 439; Werner v. Leisen, 31 Wis. 169.

[79] Francis v. Taylor, 31 Misc. 187, 65 N. Y. S. 28; Tindel v. Park, 154 Pa. St. 36, 26 Atl. 300.

[80] Frothingham v. Barney, 6 Hun (N. Y.) 366.

[81] Taber v. Breck, 192 Mass. 355, 78 N. E. 472.

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CHAPTER XXXIII

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§ 1065. Introductory.

Naturally, there is no exclusive form prescribed for a general partnership agreement. The chief aim is to embody therein, in clear and unmistakable terms, the various provisions according to the understanding of both parties thereto. For this reason, some of the usual forms adopted in general practice are herein given, simply as suggestions, which may be varied to meet each case.

It is common practice to commence the contract in one of the following manners:

This agreement, made this —— day of ——, at ——, ——, between ——, hereinafter known as the party of the first part,

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and ——, hereinafter known as the party of the second part, witnesseth: (Follow with body of contract.)

This form, in few words, is very convenient, as it disposes of the questions of parties, time, place, and shows that there is a meeting of the minds of the parties thereto.

Another form, which does not cover so many questions, follows:

It is hereby understood and agreed between ——, party of the first part, and ——, party of the second part, that (follow with body of contract).

However, as stated before, no particular form is necessary, and a simple statement, such as:

"We, —— and ——, hereby agree that," followed by the agreement, is sufficient, or other forms, such as the following:

This agreement of partnership, made and entered into this —— day of ——, by and between ——, ——, and ——, all of the city and state of ——, witnesseth:

That the said parties agree hereby to become partners upon the terms and conditions herein set forth; or

Articles of copartnership entered into on ——, between ——, of ——, and ——, of ——, witness:

The aforesaid parties hereby form a business partnership upon the following terms:

Although not always necessary, it may be so, and is much better, that somewhere in the contract the date of the contract, and the place of execution, should be shown. If not, the general rule is that these, as well as other matters, may be shown by parol, but it is certainly better to have them definitely fixed in the written contract.

§ 1066. Body of contract.

The body, or substance matter of the contract, is, as a rule, the important matter to be considered. The above introductions may be used with practically all forms of contract, but the body must be changed to meet every condition. A collection of forms, covering the more usual subjects provided for in partnership

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agreements is here given, which may be used as framework upon which to build the contract desired.

These forms should follow an introductory statement, as, for example, one of those given above. First, there will be given various forms for particular clauses, some of which are necessary in most partnership agreements, and these will be followed by a series of complete forms, which may serve as a guide in any particular case.

Particular Clauses in Partnership Agreements

§ 1067. Firm name.

(a) The firm name of the said partnership shall be ——.

(b) The business of the said partnership shall be carried on under the firm name of ——.

§ 1068. Duration.

(a) This partnership shall continue for the term of —— years from the date of this agreement.

(b) This partnership shall continue for the term of —— years, unless it shall sooner be terminated by mutual agreement.

(c) This partnership shall continue until the death of the parties, unless previously terminated, but either party may terminate it at will upon giving —— days' notice to the other partners.

§ 1069. Firm name and duration.

(a) —— and —— agree to become and remain partners in the business of ——, from the —— day of ——, 19—, during the term of —— years, under the firm name and style of ——.

(b) The said ——, ——, ——, and ——, and the survivors of them, will become and remain partners in the business of ——, from the —— day of ——, 19—, during the term of —— years, if they or any two of them shall so long live, under the firm name of ——, subject, nevertheless, to determination as hereinafter provided.

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§ 1070. Partnership to continue after retirement or death of partner.

(a) Any partner may retire from the partnership on or at any time after the —— day of ——, 19—, on giving not less than —— months' previous written notice to the others of his intention so to do, and at the expiration of such notice the partnership shall determine so far as regards the partner giving or leaving such notice, but not as between the remaining partners.

(b) The death of any partner shall not dissolve the partnership between the remaining partners.

§ 1071. Where business is to be conducted.

(a) The partnership business and operations shall be carried on at ——, or at such other place as the partners shall from time to time determine.

(b) The offices of said firm shall be situated at ——.

§ 1072. Purposes.

(a) This partnership shall be for the purpose of buying, selling and dealing in ——.

(b) The object of this copartnership shall be to engage generally in the business of ——, and its allied arts and trades, and of buying, selling and generally dealing in all goods, merchandise and supplies incidental thereto.

(c) This partnership is for the purpose of buying, developing and selling a certain tract of land described as follows: ——, and for no other purpose.

§ 1073. Capital.

(a) The capital of the partnership shall be —— dollars, and each partner shall contribute equally thereto (or in the shares or proportions following, namely, etc.), or in such shares as may from time to time be agreed upon in writing.

(b) The stock in trade and plant now owned by the said —— shall be taken to be of the value of —— dollars, and shall become the partnership property at such valuation, and shall be credited to the said —— on account of the capital which he is to contribute.

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§ 1074. One partner furnishing capital.

The said —— shall at once bring into the business the sum of —— dollars as capital, which shall be employed in the said business, and for the benefit of the partnership, during the partnership term, without any allowance of interest for its use, and shall, from time to time, at the request of the said ——, advance and bring into the said business such further sums of money (not exceeding the sum of —— dollars in any one year, nor exceeding, together with the said sum of —— dollars, the total sum of —— dollars) as shall, in the opinion of the said ——, be required for carrying on the said business, and shall be allowed interest on such further advances at the rate of —— per centum per annum out of the profits of the said business, before any division of such profits.

§ 1075. One partner without capital.

(a) Said A shall furnish —— dollars as a working capital for said firm, and shall hold the same as a debt against the said firm, and shall draw —— per cent. per year as interest thereon.

All losses or net profits shall be shared equally between said partners.

(b) The said —— shall furnish the sum of —— dollars as capital to carry on the business. The said —— shall devote his entire time, services and skill to the management of the business and shall not be required to contribute to the capital stock of the partnership, and shall share equally in profits and losses (including depreciation in capital) with the other partners.

§ 1076. Additional money contributed by one partner.

(a) In case the said business shall require extra capital, and any partner herein shall, with the consent of his copartners, contribute capital in addition to the amount provided for herein, it shall be considered as a loan to said firm and shall draw interest at —— per cent. per annum from the time it shall be so contributed until paid.

Such capital shall not be withdrawn except on —— weeks'

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notice, served on each member of said partnership, unless such partners shall agree to waive such time limit.

Such capital may be returned to said partner at any time, upon at least —— weeks' notice to such partner by a majority of the partners, of such intention. If not so accepted by him, it shall cease to draw interest at the expiration of said —— weeks.

(b) If any partner shall, with the other partners' consent, bring in additional capital, or leave any part of his profits in the business, the same shall be considered a debt due to him from the partnership, and shall bear interest at the rate of —— per cent. per annum, and shall not be drawn out except upon giving —— calendar months' written notice; and the partner who has brought in additional capital or left in part of his profits shall be bound to draw out the same on a like notice given to him by the other partners, and at the expiration of such notice interest shall cease to be payable thereon.

§ 1077. Increase of capital.

(a) If, at any time during the continuance of this agreement, it shall be deemed for the best interests of the said firm that the capital be increased, and a majority of the partners shall vote to so increase said capital, then each partner in said firm shall contribute to such additional capital in the same proportion as the amount of capital he then holds bears to the total capital of the firm at such time.

In case any partner neglects or refuses to so contribute such additional capital, then the partners contributing shall be entitled to purchase the interest of such noncontributing partner, at its appraised value before any of their additional capital is contributed by such contributing partners.

(b) If, at any time hereafter, further capital shall be required for carrying on the business, and a majority of the partners shall determine to increase the capital, the additional capital shall be advanced by the partners in equal shares (or in such proportions as they have respectively contributed to the original capital of the firm).

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§ 1078. Patents as partnership property.

(a) The patent rights in the patent known and described as follows, to wit (description), now held by ——, shall be contributed by said ——, to said partnership, and as a consideration therefor he shall have, fully paid up, a one-third interest in the said partnership, and such partnership interest in all the assets of said partnership.

Said patent shall be duly and legally transferred by said —— to this partnership, which partnership shall thereby be substituted for said —— as to all his rights, of every kind and description, in said patents now owned by ——.

(b) The patent right in (describing patent) shall be considered as part of the partnership property, and to have been brought into the business as capital by the said patentee; and no share or interest therein, or license to use the same, shall be sold, granted or assigned to any person or persons, without both partners' consent; and moneys, benefits and advantages to accrue from any such sale, grant, assignment or license shall be divisible between the partners in the same proportions as the profits of the business are hereinafter directed to be divided. The said patent right shall, for the purposes of the business, and of any accounts in relation thereto, be taken to be of the value of —— dollars at this date, and to become depreciated in value at the rate of —— dollars every half year.

§ 1079. Interest on capital.

Each partner shall be credited in partnership accounts with interest at the rate of —— per cent. per annum on the share of the capital for the time being standing to his credit, and such interest shall be paid to him on the —— day of ——, and the —— day of ——, in every year, before any division of profits is made, and such capital and interest shall be deemed to be a debt due from the partnership.

§ 1080. Rent paid to one partner.

The said —— shall be allowed by the partnership —— dollars per year, as rent for the aforesaid real estate in —— street,

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while the said business shall be carried on therein; but said real estate shall continue the sole property of the said ——, subject only to be used for the purposes of the partnership business.

§ 1081. Deposit of partnership moneys.

(a) All moneys which shall from time to time be received for or on account of said partnership, not required for current expenses, shall be deposited immediately in the bank for the time being dealt with by the partnership (or, to the —— bank), in the same drafts, checks, bills or cash in which the same are received, and all disbursements for or on account of the partnership shall be made by check on such bank.

(b) The bankers of the partnership shall be the —— Banking Company, or such other bankers as the partners shall from time to time agree upon; and all partnership moneys (not required for current expenses) shall be paid into the firm's account at the said bank at the end of every week. Each partner shall be at liberty to draw on the partnership account, but only for partnership purposes or as mentioned in succeeding clauses hereof, and only by drafts or checks upon such bankers in the firm name.

§ 1082. Expenses.

All rent, expenses for repairs or improvements, all taxes, premiums of insurance, salaries and wages, and any and all other reasonable and necessary expenses, losses and damages which may be incurred in carrying on the partnership business (and the interest on the capital, payable to the respective partners), shall be paid out of the receipts and earnings of the said business, and in case such receipts and earnings are insufficient to pay such charges, then said partners shall contribute thereto in the shares or proportions in which they are entitled to the profits of the business.

§ 1083. Division of profits and losses.

(a) Each partner herein shall share in all profits or losses of said business in the same proportion as his share in the capital of said firm bears to the total capital of said firm.

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(b) The partners shall be entitled to the net profits of the business in equal shares (or in the shares following, that is to say, etc.), and the net profits shall be divided as soon after the end of each year as the general annual account shall have been taken, as hereinafter provided.

All losses happening in the course of the said business shall be borne in the same proportions, unless caused through the wilful neglect or default (and not the mistake or error) of either of the said partners, in which case the loss so incurred shall be made good by the partner through whose neglect or default such losses shall arise.

(c) The partners shall at all times during the continuance of their partnership bear, pay and discharge equally between them all rents and all other expenses that may be required for the prosecution and management of the said business; and all gains, profits and increase that shall come or arise from or by any means of their said business shall be divided between them equally; and all loss that shall happen to their said joint business by depreciation of commodities, bad debts or otherwise, shall be borne and paid between them equally.

(d) The profits and losses shall belong to, and be borne by, the said —— and —— in equal shares.

(e) And each of said partners shall be entitled to one equal —— part of the profits of the said business, and all losses happening in the course of the said business shall be borne in the same proportions, unless the same shall happen through the wilful neglect or default (and not the mistake or error) of either of the said partners, in which case the loss so incurred shall be made good by the partner through whose neglect or default such losses shall arise.

§ 1084. Guaranty of profits.

In case the share of said —— in the said net profits shall in any year be less than —— dollars, such share shall in every such year be made up to —— dollars by the other partners, by contri-

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butions in proportion to the shares in which they are entitled to the net profits.

§ 1085. Advances to partners.

(a) The said partners shall be at liberty to draw out of the said business, in anticipation of their expected profits, the following sums, namely: the said ——, a sum not exceeding —— dollars; the said ——, a sum not exceeding —— dollars; and the said ——, a sum not exceeding —— dollars in any quarter of a year; but in case in any year the amount so drawn out by any partner shall, on taking the general account, be found to be in excess of his share, then immediately after such account he shall refund the excess so drawn out.

(b) The partners may, from time to time, draw out of the said business, for their own use respectively, any sum or sums not exceeding the sums following, that is to say: The said ——, the sum of —— dollars per month; the said ——, the sum of —— dollars per month; and the said ——, the sum of —— dollars per month; such sums to be duly accounted for by each partner respectively on the taking of every such general annual account hereinafter directed; and any partner whose drawings shall, on the taking of such account, be found to exceed his share of the net profits and interest on capital accrued to him for the previous year, shall forthwith refund the difference.

(c) Each of the said partners respectively shall be at liberty, from time to time, to draw out of the said business any sum or sums of money, not exceeding the sum of —— dollars per month, for his own use; all such sums, at the time of drawing the same, to be entered in the cash-book, and to be duly accounted for on every settlement of accounts and divisions of the profits of the said business.

(d) The said —— may draw, out of the profits, money not exceeding —— dollars in each month; and the said —— may draw, out of the profits, money not exceeding —— dollars in each month.

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§ 1086. Overdrawing accounts.

Neither partner hereto shall draw, for his own use, any of the funds of this firm, except salary and division of profits, when due and payable, as provided in this contract, unless it shall be with the previous knowledge and consent of his copartner.

In such cases, where one partner, with the consent of his copartner, shall so withdraw any firm funds for his individual use, he shall pay interest thereon at the rate of —— per cent. per annum. As an offset to such interest, he may deduct interest, at the same rate, on any of his individual funds used by said firm, provided it be so used with the consent of all the partners in said firm.

§ 1087. Expense accounts.

Each partner herein shall be entitled to an expense account of not to exceed —— dollars per week, of his actual, reasonable and necessary expenses, incurred for and in behalf of said firm, but shall keep an itemized account thereof, which account shall only bind the other members thereof, when approved in writing by at least a majority of said partners. All such accounts shall be filed, after such approval, and kept for a period of at least one year after such approval.

§ 1088. Advances by partner to firm.

Any partner may from time to time, with the consent of the others, advance any sums of money to the firm by way of loan, and every such advance shall bear interest at the rate of —— per cent. per annum, from the time of making the advance until repayment thereof, and may be withdrawn at any time on —— months' notice.

§ 1089. Dormant partner.

Said —— shall contribute the sum of —— dollars to said firm, as his share of the capital thereof, but shall have no active part in the management of the business of said firm, nor shall his name be used in said firm name, nor in any advertising of said firm, but shall be entitled to —— per cent. of the profits, if any, of

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said firm, and shall bear —— per cent. of the losses, if any, of said firm.

Nothing herein, however, shall be so construed as to restrict said —— from an inspection of said business, and the books and accounts thereof, at any reasonable time.

§ 1090. Regular meetings.

On Monday of each week, at 7:30 p. m., there shall be a meeting of said partners, at the office of said firm, for the purpose of going over expense accounts for the preceding week, and for the further purpose of discussing and acting upon the general conduct of the business of said partnership.

For any matters within the scope of the business, and within this or supplemental contracts, a majority of said partners present at any such meeting shall prevail. Any change of the scope or nature of said business, however, shall not be made except by and with the knowledge and consent of all of said partners.

§ 1091. Bond of partner.

Each member of this partnership shall enter into a bond in the sum of —— dollars, satisfactory to all of his copartners hereunder, to the effect that he shall fully account to the said partnership for all property of the said firm which shall come into his possession, and that he will turn the same over to said firm.

§ 1092. Time to be devoted to firm.

(a) Each partner shall devote his whole time and attention to the partnership business, and diligently and faithfully employ himself therein, and carry on the same to the greatest advantage of the partnership. (Provided, however, that the said —— shall give only such an amount of supervision and attention to the said business as may be necessary for the efficient management thereof, and except to that extent shall not be bound to personal attendance or participation therein. Or, the said —— shall not be obliged to attend to the said business any further than he shall think proper.)

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(b) Each of said partners shall give his whole time and attention, during office hours, to the business of said firm, excepting in case of sickness for short periods. In case of a continuous sickness for a period exceeding —— weeks, the other partners hereunder may hire help to take the place of such sick partner, for a salary of not to exceed —— dollars per week, and deduct the same from the salary of such sick partner.

Each partner shall be entitled to a vacation of —— weeks each year, but only one of said partners shall take such vacation at the same time. In case of conflict between such partners as to the time of such vacation, the choice of time shall be determined by lot.

(c.) It is agreed by and between the parties that at all times during the continuance of their said partnership they and each of them will give their attention to the business, and with their full skill and power will exert themselves for their joint interest, profit, benefit and advantage.

§ 1093. Vacations.

Each partner shall be entitled to —— weeks' vacation in each year. In the first year of the partnership the said —— shall have the first choice of the time at which he shall take his vacation, and in all succeeding years the choice shall be made by the partners alternately.

§ 1094. Engaging in other business.

(a) No partner shall, during the continuance of the partnership, carry on or be concerned or interested, directly or indirectly, in the same kind of business as that carried on by said partnership, nor be engaged in or undertake any other trade, or business, without the consent in writing of the other partners or partner.

(b) Neither partner shall, either alone or with any other person, either directly or indirectly, engage in any trade or business except upon the account and for the benefit of the partnership. (Provided, however, that the said —— may continue the —— business at —— wherein he is now concerned or engaged.)

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§ 1095. Managing partner.

The said —— shall be the manager of the said business, and shall be paid for his services as manager the annual sum of —— dollars before any division of profits is made, and in addition thereto his share of the profits, by equal quarterly payments, the first salary payment to be made on the —— day of ——

§ 1096. Salary to come only from profits.

Said —— shall devote his whole time to the said business of said firm, and shall receive therefor the sum of —— dollars per month, which salary, however, shall only be payable out of the profits of said business.

Said salary shall, however, be cumulative, and all accumulated salary shall be payable to said —— out of said profits, whenever made, before any payment shall be made to any other partner herein, of any share of said profits.

§ 1097. Limit upon contracts by one partner.

(a) Neither partner hereto shall, without the consent of his copartner, enter into any contract in behalf of said firm in excess of —— dollars.

(b) Neither partner, without the previous consent in writing of the others, shall buy or sell or enter into any contract for the purchase or sale of any goods or other articles amounting to the value of —— dollars or more.

(c) No partner shall buy, order, or contract for any article exceeding the value of —— dollars, without the previous consent in writing of the other partners or partner; and in case he does so, the other partners or partner shall have the option to take the goods or articles so bought, ordered, or contracted for, on behalf of the partnership, or to leave the same for the separate use of the partner so buying, ordering, or contracting, to be paid for out of his own money.

(d) Neither of the said partners shall, in the course of the said business, without the consent of the others of them, enter into any contract or engagement, or give credit, or lend any of the partnership moneys, or give any bill, note, or security, or

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contract any debt on account of the said partnership, except in the usual and regular course of the business, and for the benefit thereof; or compound, release, discharge, or postpone any debt, duty, or demand due to the said firm; or become bail or security; or enter into any gaming transaction or time bargain for the sale or purchase of wheat, corn, or other grain, or of any produce, or of railroad or other shares or bonds; or expose himself to any other risk as such partner as aforesaid.

§ 1098. Negotiable paper.

(a) No partner shall, without the other partners' consent, draw, accept or sign any bill of exchange or promissory note, or contract any debt on account of the partnership, or employ any of the moneys or effects thereof, or in any manner pledge the credit thereof, except in the usual and regular course of business. (Any infraction of this provision shall be a ground for an immediate dissolution of the partnership as to the offending partner, and the other partners may forthwith declare the same dissolved by a written notice to the offending partner.)

(b) All checks, notes, and other writings pledging the credit or affecting the property of the partnership, shall be signed by the said ——, or ——, and not otherwise.

§ 1099. Bonds and securities.

(a) Whenever there shall be occasion to give any bond, note, bill or other security for the payment of any money on account of the partnership, the same shall be respectively signed and executed by all the (acting) partners, unless in the course of business the use of the partnership name by one partner shall be unavoidable.

(b) If there shall be occasion to give any bond, promissory note, bill of exchange, or other security for the payment of any money on account of the partnership, except when the giving of such obligation shall in the common course of business be unavoidable, the same shall be signed by both partners; and if either partner shall give such obligation, except in the case aforesaid, the same shall be deemed to be given on his separate account, and

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shall be payable out of his separate estate, and he shall indemnify the other partner against the payment thereof.

§ 1100. Suretyship.

(a) No partner shall, without the others' previous written consent, enter into any bond, or become bail, surety or security, for any person.

(b) And it is further agreed that, during the continuance of their said partnership, none of the said partners shall indorse any note, or otherwise become surety for any person or persons whomsoever, without the consent of the others of the said partners.

(c) Unless the written consent of the other partners has been given, no partner shall enter into any bond or become surety or security with or for any person or knowingly cause or suffer to be done anything whereby the partnership property may be attached or taken in execution.

§ 1101. Extending credit.

No partner shall lend any money, or give credit to, or have dealings on behalf of the partnership with, any person, partnership or corporation whom the other partners or partner shall have forbidden him to trust or deal with; and if he shall act contrary to this provision, he shall repay to the partnership any loss which may have been incurred thereby.

§ 1102. Pledging credit.

No partner shall pledge the credit of the firm or use any money, goods or effects of the partnership except in the ordinary course of business and upon the account or for the benefit of the partnership.

§ 1103. Causing attachment of property.

No partner shall do, or willingly suffer to be done, anything whereby, or by means whereof, the stock-in-trade, capital or property of the partnership may be attached or taken on execution.

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§ 1104. Release of debts.

No partner shall, without consent of the others, compound, release or discharge any debt which shall be due or owing to the partnership, without receiving the full amount thereof.

§ 1105. Hiring employes.

No partner shall hire or dismiss, unless in case of gross misconduct, any clerk or any other person in the employment of the partnership, without the other partners' consent.

§ 1106. Giving information.

Each partner shall, upon every reasonable request, render to the others, or any of them, a true account of all transactions relating to the firm's business, and full information of all letters, accounts, writings and other things which have come into his hands or to his knowledge concerning its business.

§ 1107. Indemnity against individual debts.

(a) Each partner shall promptly pay his own debts, and keep indemnified the other partners, and the stock-in-trade, capital and property of the partnership, against the same, and all expenses on account thereof.

(b) Each partner shall at all times duly and punctually pay and discharge his separate and private debts and engagements whether present or future and keep indemnified therefrom and from all actions, claims and demands in respect thereof, the partnership property.

§ 1108. Keeping trade secrets.

Neither partner shall, during the continuance of the partnership, nor for —— years after its determination by any means, without the others' written consent, or of his executors or administrators, divulge to any person not a member of the firm any trade secret, method of manufacture or special information, employed in or conducive to the partnership business, and which may come to his knowledge in the course of, or by reason of, this partnership.

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§ 1109. Keeping accounts.

(a) Proper books of account shall be kept by the said partners, and entries made therein of all such matters, transactions and things as are usually entered in books of account kept by persons engaged in the same or similar business. Such books, and all partnership letters, papers and documents shall be kept at the firm's counting-house or office, and each partner shall at all times have free access to examine, copy and take extracts from the same.

(b) There shall be kept at all times, during the continuance of their said partnership, full and correct books of account wherein each of the said partners shall enter all moneys by them or any one of them received, paid, laid out, or expended in and about the said business, also all goods, wares, commodities, and merchandise by them or either of them bought or sold, by reason or on account of the said business, and all other matters and things whatsoever belonging in any wise to the said business and the management thereof; which said books shall be used in common between the said partners, so that either of them may have access thereto without any interruption or hindrance of the others.

(c) Proper books of account shall be kept at the office of the firm, in which shall be entered all the dealings and transactions of the said partnership. The said books shall at all times be open to the inspection of all or any of the partners, and be kept constantly posted up.

§ 1110. Taking accounts.

(a) On the —— day of ——, 19—, and on the same day in each subsequent year, a general account shall be taken of the assets and liabilities, and of all dealings and transactions of said firm during the then preceding year, and of all matters and things usually comprehended in accounts of a like nature; and in taking such account a just valuation shall be made of all items requiring valuation. Such account shall be entered in a book, which shall be signed by all the partners, and when so signed shall be binding

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on them, save that, if any manifest error therein shall be found and signified by any partner to the others within —— calendar months thereafter, the same shall be rectified. (The profits arising from the business as determined by such account shall be carried to the credit of the partners in the proportions hereinbefore specified on the firm's books immediately after every annual account shall have been taken and signed, and may be drawn out at pleasure.)

(b) The said partners, once in each year, namely, on the —— day of —— in each and every year, or oftener if necessary, shall make and render, each to the other, full and correct inventories and accounts of all profits and increase by them or either of them made, and of all losses by them or either of them sustained; and also of all payments, receipts, disbursements, and all other things by them made, received, disbursed, acted, done, or suffered in their said partnership and business; and upon the rendering of every such account shall clear, adjust, pay, and deliver, each to the other, their just share of the profits so made as aforesaid

§ 1111. Majority to rule.

(a) In case of disagreement between the members of said partnership upon any question not governed by this agreement, a majority vote of all the members of said partnership shall govern. Such majority vote shall not, however, be allowed to change any of the provisions of this partnership agreement.

(b) In all cases relating to the management of the partnership business, the decision of a majority in value of the acting partners shall be conclusive upon and bind all the partners.

§ 1112. Power to expel partner.

(a) Whenever any member of said partnership shall neglect or refuse to abide by the provisions of this contract, or to carry out his duties as provided therein, he may, by a two-thirds vote of all the members of said firm, be expelled from said partnership, upon —— days' written notice of said vote, and upon the payment to him of his proportionate share of the assets of said firm, as found upon an inventory thereof, said inventory to be

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made by two competent persons, one of which shall be selected by such partner sought to be expelled, and one by his copartners. In case the assets of said firm are less than the liabilities, as shown by such inventory, then such expelled partner shall forthwith pay to said partnership his proportionate share of said deficiency, upon the remaining partners paying the creditors of said firm in full, or upon their giving satisfactory bond to such expelled partner, indemnifying him from such debts.

The same rule of expulsion shall govern in case of the death, insanity, insolvency or assignment of his interest in said firm. Provided, however, that in case notice can not be served upon him on account of death or insanity, that it shall be upon his guardian or personal representative.

(b) If either partner shall infringe any of the clauses herein contained, or break any of the provisions of this agreement, or become insane, or enter into any arrangement or composition for the benefit of his creditors, or shall (without the consent of the other partner) make any assignment either absolutely or by way of mortgage, or declaration of trust of all or any of his share and interest in the partnership, the other partner may forthwith determine the partnership by written notice, left at the place of business, and may thereafter continue the business alone, and may advertise notice of the dissolution in the —— (newspaper), and, if necessary, sign the infringing partner's name to such notice of dissolution.

§ 1113. Sale or assignment of partner's share.

(a) No partner shall assign his share or interest in the partnership, without the previous written consent of the others.

(b) It shall be lawful for any partner, or his executors or administrators, to assign all or any of his share or interest in the partnership concern, subject to the provisions as to preemption herein contained.

(c) Any partner who shall desire to sell his share and interest in the business shall be at liberty to do so, but shall in such case first offer such share and interest to the other partners or partner

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for the time being at a price to be named by the selling partner, and if the other partners or partner shall not within one calendar month accept such offer, then the selling partner shall be at liberty to sell his share and interest to any other person or persons at the same or a higher price, but shall not sell the same to any other person at a less price, unless and until it shall have been offered to the other partners or partner for the time being at such less price, and such last-mentioned offer shall not have been accepted within one calendar month.

§ 1114. Retiring partner not to compete with business.

In the event of any of the said partners retiring as aforesaid, he shall not, during the remainder of the term of the said partnership, carry on or engage or be interested, directly or indirectly, in any other business competing or interfering with the business of the said firm.

§ 1115. Admission of sons into firm.

Either of said partners may at any time nominate a son, being of the age of twenty-one years or more, to succeed to his share in the partnership and the capital and future profits thereof; and upon signing a proper written contract respecting the admission of a new partner, every such son shall be and become a partner in the partnership concern in the place, and in respect of the share and interest, of his father therein, and be entitled thereto upon the same terms and conditions, and under and subject to the same advantages, regulations and agreements, in all respects and in the same manner, as the father would have been entitled to if he had remained a partner, or as near thereto as the difference of circumstances will permit.

§ 1116. Survivorship.

There shall be no benefit of survivorship between the partners, and the executors and administrators of each partner who shall die shall become entitled to his share as part of his personal estate.

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§ 1117. Purchase of deceased partner's share by surviving partners.

If any partner shall die before the expiration of the term of partnership, the surviving partners or partner shall have the option to retain his share in the firm capital in the said business during the residue of the term of the partnership, and shall signify such option to the representatives of the deceased partner within a reasonable time; and in case the surviving partners or partner shall elect so to do, the said business shall be carried on during the residue of the said term, as nearly as may be, according to the provisions of this agreement, but so that the representatives of the deceased partner shall succeed to his share in the business, and be substituted for him as silent partners only: Provided, that in case the surviving partners or partner shall continue the business by virtue of such option as aforesaid, all proper instruments for carrying the provisions of this clause into effect shall be executed and made between them or him and the representatives of the deceased partner: Provided, also, that if the net profits of the business which shall be coming to the representatives of such deceased partner shall in any year be less than —— per cent. on the amount of the capital of such deceased partner retained in the said business, it shall be lawful for such representatives to retire from the partnership on giving not less than —— months' notice to the other partners or partner of their intention so to do, or leaving such notice at the firm office; and at the expiration of such notice the partnership shall determine as to them, and they shall be entitled to receive the share of capital of such deceased partner, with all interest and profits becoming due thereon up to the expiration of such notice, on the same or the like footing as if the deceased partner had then died, and such option of retaining his capital as aforesaid had not been exercised.

§ 1118. Dissolution in case of loss.

(a) In case the net assets of said partnership shall at any time fall below the sum of —— dollars, then any member thereof, in

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spite of the fact that the partnership has not expired by lapse of time, may withdraw from said firm, and commence an action for the dissolution of said firm.

(b) At any time when, owing to losses from any cause whatever, one-fourth of the entire capital of the partnership has been sunk, or reasonable apprehensions are entertained that further capital, to the extent of —— dollars, will be required in order to carry on the firm business, a majority in value of the partners may require the partnership to be dissolved and wound up, as if the same had expired by lapse of time.

(c) If it shall appear at any account-taking of the said partnership that a loss of the amount of —— dollars or upward has been incurred during the preceding year, or that a loss of the amount of —— dollars or upward altogether has been incurred since the commencement of the partnership business, it shall be lawful for any of the partners thereupon to determine and dissolve the said partnership by giving, within three calendar months from the time of such account-taking, notice in writing to the other partner or partners of his determination, and the partnership shall be considered to have determined at such last mentioned account-taking.

§ 1119. Withdrawal of partner.

(a) If at any time after the —— day of ——, 19—, any partner shall desire to retire from the partnership, he shall be at liberty to give to the other partners or partner, or to leave for them or him at the place where the business shall for the time being be carried on, written notice of such desire and of his intention to determine the partnership so far as he is concerned; and the partnership shall, at the expiration of —— months after the giving or leaving of such notice, determine accordingly as regards the partner giving such notice.

(b) Any partner may retire at any time from the partnership, upon giving written notice of his intention to do so, to the other partners personally, and the partnership shall determine as to him —— months after the date of said notice; but the other partners

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may purchase his interest at a fair valuation and carry on the business.

§ 1120. Dissolution on bankruptcy of partner.

If any partner shall be adjudicated bankrupt or insolvent, or shall take proceedings for liquidation by arrangement or composition, or compound with his own creditors, and the other partner shall thereupon give to him notice in writing that the partnership shall forthwith determine, or shall leave such notice at the place where the business of the partnership shall for the time being be carried on, then immediately upon such notice being so given or left the partnership shall determine. The partner giving such notice shall be at liberty to advertise a notice of dissolution, and, if necessary, to sign the name of the other partner to such notice.

§ 1121. Dormant partner's share on dissolution.

Upon the dissolution of the said partnership by lapse of time, the death of either of the said partners, or by such notice to be given by the said (dormant partner), as aforesaid, the said (dormant partner), or his executors or administrators shall in the first place receive out of the said partnership joint stock and effects the full sum of —— dollars, being the full amount of the capital contributed by him, in satisfaction of his share thereof, without any deduction or abatement on account of any losses or other expenses which may have been incurred in the carrying on of the said business; which said sum of —— dollars shall be paid to the said (dormant partner), his executors or administrators, by the bond of the said (acting partners), by four equal instalments, at three, six, nine and twelve calendar months, to be computed from the time of the dissolution of the said partnership, together with interest for the same at the rate of —— per cent. per annum, to be computed from the time of such dissolution. In case the said partnership stock and effects shall prove insufficient to pay unto the said (dormant partner), his executors or administrators the said sum of —— dollars, then and in such case the same shall be made

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good by the said (acting partners), their executors or administrators, out of his or their own separate estate.

§ 1122. Good will.

(a) On the death or retirement of any partner no allowance (or an allowance) shall be made to him or his representatives in respect of the value of the good will of the said business.

(b) The good will of said partnership shall be considered an asset of said partnership, and, upon dissolution of the said firm, it shall be sold with the other assets. No partner, after such dissolution, shall do business under such firm name, unless he shall purchase the same, but nothing herein contained shall be so construed as to prevent any partner from pursuing the same line of business after such dissolution, under another name.

In case any partner shall withdraw or be expelled from the said firm, the said rules shall apply to him, but the remaining partners shall be entitled to the said firm name.

(c) On dissolution of said partnership the good will of the business shall not be sold, but each partner shall be at liberty to commence and carry on a similar business in his own or other name not identical with the firm name and to send circulars to the firm customers announcing the facts of the dissolution and commencement of business by a former partner.

(d) On dissolution of said partnership, if sold as a going concern, the good will of the business shall be treated as a partnership asset and no partner (unless he shall be the purchaser of such business) shall, for —— years from the completion of such sale, directly or indirectly carry on or be concerned or interested in the business of —— as principal, agent, manager, traveler or servant within —— miles from the place of business of said partnership.

§ 1123. Purchase of partner's share in good will.

In the event of the death or retirement of any partner and the purchase of his share by another partner the good will of the business shall be regarded as part of the partnership assets, and the value thereof shall be deemed to be —— times the average

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annual profits of the partnership for the then last preceding —— years or from the commencement of the partnership, whichever be the shorter. A retiring partner whose share is purchased shall not, for —— years after such purchase, directly or indirectly carry on or be concerned or interested in the same business as principal, agent, manager, traveler or servant within —— miles from the place of business of said partnership.

§ 1124. Sale of deceased partner's interest.

The executors or administrators of any partner who shall die during the partnership, or any person or persons to whom he may by will bequeath his share in the partnership shall be entitled to his share in the firm, capital stock, property and effects and may either continue as partner or partners in the business in respect and to the extent of his share and interest of such deceased partner, or may sell the same in the manner hereinbefore provided with respect to a sale by any living partner of his share and interest.

§ 1125. Purchase of share of deceased or bankrupt partner.

Upon the death of any partner or his adjudication as bankrupt or insolvent, or the taking of proceedings for liquidation by arrangement or composition with his creditors, the partnership shall thereupon determine as to him, and he or his executors, administrators or assigns, as the case may be, shall have no interest in common with the surviving or other partners or partner in the firm property, but shall be considered in equity as a vendor or vendors to the surviving or other partners or partner of the shares in the partnership of the deceased, or bankrupt, or liquidating, or compounding partner, as from the day of his death, or bankruptcy or insolvency, or of his having taken such proceeding for liquidation as aforesaid, or of his having compounded as aforesaid, at the amount standing to his credit at the last preceding annual account, together with interest thereon at the rate of —— per cent. per annum, in lieu of profits, from such annual account, or in case of bankruptcy or insolvency, at the option of the assignee, at an amount to be ascertained by arbitration, under

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the provision hereinafter contained; but less any sums withdrawn by him in the meantime in diminution of his share of capital or profits; and the balance, with such —— per cent. added, or the amount ascertained by arbitration, as the case may be, shall be considered a debt owing from the partnership to the deceased, bankrupt, liquidating or compounding partner, or his executors, administrators or assignee, and shall be paid by three equal instalments at ——, —— and —— calendar months, with interest thereon at the rate of —— per cent. per annum; and all necessary deeds and assurances shall be executed for vesting the share of such partner in the surviving or other partners.

§ 1126. Payment of deceased partner's share to his representatives.

If any partner shall die, an account and statement shall be taken and made out of his share of the capital and effects of the partnership, and of all unpaid interest and profits belonging to him up to the time of his death, for which purpose a valuation shall be made of any and all assets or effects requiring valuation, and the amount so ascertained to be due and owing to the deceased partner shall be paid by the surviving partners to his representatives within —— calendar months from the date of his death, with interest thereon from the date of his death, until payment at the rate of —— per cent. per annum; and on such payment the share of the deceased partner in the partnership property and effects shall go and belong to the surviving partners in the proportions in which they shall have contributed to the purchase thereof.

§ 1127. Continuation in business by deceased partner's representatives.

If any partner shall die before the expiration of the partnership term, his representatives shall have the option, to be declared by notice in writing given to the surviving partners or partner, or left at the firm office, within —— calendar months after his death, of succeeding to his share in the said business as from his death as silent partners; and if such option shall be

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exercised, the said business shall be carried on during the residue of the said term as from the death of such deceased partner as nearly as may be according to the provisions hereof, so that the deceased partner's representatives shall succeed to his share in the said business, and be substituted for him as silent partners only: Provided also, that in case the representatives of a deceased partner shall elect to become silent partners, by virtue of such option as aforesaid, all proper instruments for carrying the provisions of this present clause into effect shall be executed and made between them and the surviving partners or partner.

§ 1128. Winding up business.

Upon dissolution of the partnership a full and general account of the firm assets, liabilities and transactions shall be taken, and the assets and property of the firm shall, as soon as practicable, be sold, the debts due the partnership collected, the proceeds to be applied, first, in the discharge of the firm liabilities and the expenses of liquidating the same; and next, in payment to each partner or his representatives of any unpaid interest or profits belonging to him, and of his share of the capital; and the surplus, if any, shall be divided between the partners or their representatives in the shares in which they contributed the firm capital; and the partners or their representatives shall execute all requisite or proper instruments for facilitating the collection and division of the partnership property and for their mutual indemnity and release.

§ 1129. Division of property upon dissolution.

(a) At the expiration of this agreement the said parties herein shall each give all possible aid to arrive at a just and true account of all the assets and liabilities. The said assets, including the good will of said business, shall first be offered for sale to the partners herein, and the partner offering the most for the same shall be allowed to purchase the same.

In case there is no partner who desires to purchase the said assets, then the said assets shall be sold to whomsoever shall pay the most therefor.

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In either event, all liabilities shall be paid for out of the proceeds of such sale. The net amount secured by such sale shall be divided among the parties, in proportion to their interest in said firm, at such time of dissolution.

(b) At the end of their partnership the said partners shall make each to the other full and correct accounts of all things relating to their said business, and shall in all things truly adjust the same; and all the stock and effects, and the gains and increase thereof, which shall then appear to be remaining either in money, goods, wares, fixtures, debts or otherwise, shall be divided between them in the same shares and proportion that they have contributed to firm capital.

(c) In case any disagreement shall arise as to the division of the said credits, moneys, property and effects, then the outstanding credits shall be collected by some person to be mutually appointed by the said partners, who, after deducting thereout an allowance for his trouble, and all incidental expenses incurred in such collection as aforesaid, shall pay over the same to the said partners in the proportions in which they are so respectively entitled thereto, and shall sell the remainder of the said partnership property and effects, and divide the moneys arising therefrom between the said partners in the same proportions.

§ 1130. Final accounting.

Within —— days after the dissolution of the partnership, a full and general account and balance-sheet shall be taken and made of the firm property, assets and liabilities; and a full and particular inventory and valuation of all the firm machinery, plant, tools, utensils, stock-in-trade, materials and effects shall be made by —— of ——, or such other person or persons as the parties hereto agree upon for that purpose; and all debts owing to the firm shall be collected and got in by —— of ——, or such other person or persons as the parties hereto shall jointly appoint for that purpose.

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§ 1131. Purchase by one partner on dissolution.

Upon the determination of the said partnership, if either partner shall desire to purchase the other partner's share in the said partnership effects, he may do so on giving to the other partner, his executors or administrators, written notice of such desire, within thirty days after the dissolution of such partnership. And if the said partners shall happen to differ as to the price to be given for the share of the other partner in the said partnership effects, then the value thereof shall be ascertained by two disinterested persons, one to be chosen by each partner, and these referees, previously to their entering upon the reference, shall choose an umpire between them, whose decision, if such referees do not agree, shall be binding and conclusive on all parties; and if either of the said parties shall refuse to name a referee within seven days after request, then the referee named by the other party may proceed alone, and his award shall be binding and conclusive on all parties; and the partner desiring to purchase shall thereupon pay to the other partner, his executors or administrators, such sum of money for the purchase of the said business as the said referees, or their umpire, shall determine to be the value thereof. In case both partners desire to purchase at such valuation, the right to do so shall be awarded to the partner who shall bid for the privilege of purchasing the highest sum above such valuation.

§ 1132. Purchase of retiring partner's interest.

In case the said partnership shall be dissolved in pursuance of any notice, given or delivered as heretofore provided, the party to whom such notice shall have been so given or delivered shall be at liberty to purchase the interest of the retiring partner, and shall pay him the value of his share in the effects of the said partnership; and the amount of such share shall be ascertained by two persons, one to be chosen by the partner who shall give such notice, and the other by the continuing partner, who, previously to their entering into the reference, shall choose, etc. (Continue as in last clause.)

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§ 1133. Retiring partner's covenant as to debts.

The said —— hereby covenants with the said —— in manner following (that is to say), that he, the said ——, has not at any time heretofore contracted any debt or obligation which can or may charge or affect the said ——, his executors or administrators, or any part of the firm's assets or effects; nor received nor discharged any of the firm's credits, except as appears by the firm books; nor done any act whereby any part of the share and premises hereby assigned, may be charged or encumbered in any manner howsoever; and that he, the said ——, his executors or administrators, will at all times hereafter, on the request and at the costs of the said ——, his executors, administrators or assigns, make, do and execute every such further assurance, act or thing whatsoever for the more effectually vesting in the said ——, his executors, administrators or assigns the premises hereby assigned, and every part thereof, and enabling him and them to receive the same, as shall be reasonably required; and that he, the said ——, his executors or administrators, will not at any time hereafter receive, compound or discharge any of the goods, credits or effects, one moiety whereof is intended to be hereby assigned, and will not release, disavow or become nonsuit in any action or proceeding which may be brought by the said ——, his executors or administrators, by virtue of the said power, or do any other act or thing in derogation of the assignment hereby made, or the powers or authorities hereby given.

§ 1134. Indemnity to retiring partner.

(a) In case any partner herein shall at any time withdraw from said partnership, and shall sell his interest therein to the remaining partners, or, in case of dissolution, when a part of such partners shall purchase the interests of the other partners, then such purchasing partners shall give good and sufficient bond to such withdrawing partners, to the reasonable satisfaction of such withdrawing partners, in an amount equal to the amount of the debts of such firm, conditioned for the payment, in full, of all outstanding debts of said firm, when due, and for the

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saving, as to such withdrawing partners, of any loss which might occur to such withdrawing partners, by reason of the non-payment of such debts, as herein provided.

(b) The said —— hereby covenants with the said —— that he, the said ——, his heirs, executors or administrators will pay and discharge all said firm's debts and liabilities within —— calendar months from the date hereof, and will at all times hereafter effectually keep indemnified the said ——, his heirs, executors and administrators, and his and their estate and effects, against all actions, proceedings, costs, damages, expenses, claims and demands in respect thereof, and also against all costs, damages and expenses by reason of any action or proceeding which may be brought or instituted by the said ——, his executors or administrators, in the name or names of the said ——, his executors or administrators, by virtue of the power or authority hereinbefore contained, or any act, matter or thing in relation thereto.

§ 1135. Amending partnership agreement.

(a) If, at any time during the continuance of said partnership under this agreement, it shall seem advisable by all parties hereto to change or amend this agreement, for any legal purpose whatsoever, such change or amendment may be made at any time, by supplemental contract, in writing, signed by all members of said firm. Such supplemental contract shall be attached hereto, and shall govern in all matters wherein it changes any of the provisions of this contract.

(b) If at any time during the continuance hereof the said parties shall deem it necessary or expedient to make any alteration in any article, clause, matter or thing herein contained, for the more advantageous or satisfactory management of the said partnership business, it shall be lawful for them so to do by any writing under their joint signatures indorsed on these articles, or entered in any of the partnership books; and all such alterations shall be adhered to and have the same effect as if the same had been originally embodied in and formed a part of this agreement.

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(c) And it is hereby lastly agreed, that if at any time or times hereafter it shall appear to the said partners, or the major part of them for the time being, that these presents, or any covenants, stipulations, clauses, matters, or things herein contained, are in any way inefficient or defective, or are not expressed with sufficient clearness to be safely acted upon, and any alteration therein or addition thereto shall be advised by counsel for and on behalf of the said partners, then and in every such case the said partners will enter into, execute and perfect all such further deeds and assurances as such counsel shall so advise as aforesaid; such deeds or other assurances to be prepared at the expense of the said joint partnership concern.

(d) These articles of partnership may be amended at any time in any respect by written agreement of all the partners.

§ 1136. Arbitration clauses in partnership agreements.

(a) Whereas the said parties have carried on the business of —— as a partnership, and the accounts between them have become involved, and differences have arisen among them relating thereto, it is hereby agreed that the copartnership accounts and all matters in difference between the parties, or any of them, or between any one or more of them, and any other one or more of them, shall be referred to the arbitration of two indifferent persons, one to be appointed by each party to the reference, or an umpire to be appointed by the arbitrators in writing, before entering on the business of the reference; and if either party shall refuse or neglect to appoint an arbitrator within —— days after the other party shall have appointed an arbitrator, and shall have served a written notice upon the first mentioned party requiring such party to make such appointment, then the arbitrator appointed as aforesaid shall, at the request of the party appointing him, proceed to hear and determine the matters in difference as if he were an arbitrator appointed by both parties for that purpose; and the award or determination made by the said arbitrators, arbitrator, or umpire shall be final and binding upon the said parties hereto respectively, and their respective heirs,

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legal representatives and assigns: Provided the award shall be made in writing within —— days next after the reference to them or him, or on or before any later day to which the said arbitrators or arbitrator, by any writing signed by them or him, shall enlarge the time for making their or his award and provided such umpire shall make his award or determination in writing within —— days next after the original or extended time appointed for making the award of the said arbitrators shall have expired, or on or before any later day to which the umpire shall, by any writing signed by him, enlarge the time for making his award.

(b) Any and all disputes and differences, which shall arise between the said parties, shall be referred to, and decided by, two competent persons in or well acquainted with the trade, one to be chosen by either party, or by an umpire to be chosen by the referees, in the usual course in such or similar cases; and their or his decision shall in all respects be final, and conclusive on both the said parties, and shall be given, in writing, within —— days next after such submission, or within such further times, not exceeding —— days, as they or he shall require.

(c) If at any time during the continuance of the partnership, or after the dissolution or determination thereof, any dispute, difference, or question shall arise between the said partners or any of them, or their or any of their representatives, touching the partnership or the accounts or transactions thereof, or the dissolution or winding up thereof, or the construction, meaning, or effect of these presents, or anything herein contained, or the rights or liabilities of the partners or their representatives under these presents or otherwise in relation to the premises, then every such dispute, difference, or question shall be referred to the arbitration of two disinterested persons, one to be appointed by each party to the reference, or of an umpire to be appointed by the arbitrators in writing; and if either party shall refuse or neglect to appoint an arbitrator within —— days after the other party shall have appointed an arbitrator, and shall have served a written notice upon the first mentioned party requiring such party to make such appointment, then the arbitrator appointed as

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aforesaid shall, at the request of the party appointing him, proceed to hear and determine the matters in difference as if he were an arbitrator appointed by both parties for the purpose; and the award or determination which shall be made by the said arbitrators, arbitrator, or umpire shall be final and binding upon the said parties hereto respectively, and their respective executors, administrators, and assigns.

§ 1137. Reference to attorney to settle disputed rights.

If any difference shall arise between the parties hereto as to their rights or liabilities under the foregoing instrument, or of any instrument made in pursuance of the stipulations hereinbefore contained made for the more completely carrying said instrument into effect, such difference shall be determined and such instrument or instruments shall be settled by —— esquire, counselor at law, and his decisions shall be final as to the contents and interpretation of such instrument or instruments, and as to the proper mode of carrying the same into effect.

§ 1138. Close of contract.

In witness whereof, we hereunto set our hands, this —— day of ——, ——, at ——, ——.

_____

Party of the first part.

_____

Party of the second part.

_____

Party of the third part.

Witnessed by[1]

_____

_____

Notices

§ 1139. Of intention to withdraw.

(a) In pursuance of the provisions of a partnership agreement heretofore entered into between us, said partnership being known as —— and ——, *or* (whereas you have violated the

[1] Witnesses not required, except as a matter of caution, in most contracts. See statutes of each state as to when required.

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provisions of a certain contract of partnership between us, and have neglected and refused to abide by its provisions), I hereby notify you that I intend to sever all connection as a copartner with you in said business, on and after ——, ——, and I further request and demand of you that all new business of said firm cease on said date, and that the said partnership assets be determined and distributed as soon thereafter as is possible.

(b) In pursuance of the power contained in written instrument dated ——, 19—, and made between (describe parties), I hereby give you notice that I intend to determine the partnership now subsisting between us on the —— day of ——, 19—.

(c) Gentlemen—Being desirous wholly to determine our present partnership, so far as relates to myself, on the —— day of —— next, and to retire from the same on that day, I hereby, pursuant to the power enabling me so to do contained in our deed of articles of partnership, dated the —— day of ——, 19—, give you written notice thereof; and I declare that our partnership shall, so far as relates to myself, be hereby wholly determined on the said —— day of ——, and that I shall retire from the same on that day.

(d) To Messrs. ——.

I hereby give you notice that it is my intention to dissolve the partnership now subsisting between us on the —— day of —— next (being at the expiration of —— calendar months from the day of the date hereof), in pursuance of a power to that effect contained in our partnership agreement.

§ 1140. Of desire to sell.

In pursuance of the power contained in a written instrument dated ——, 19—, and made between (describe parties), I hereby give you notice that I desire to dispose of my entire share and interest in the partnership now subsisting between us at such price as may be mutually agreed upon, or as, in case of difference, shall be ascertained by arbitration.

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§ 1141. Of intention to purchase.

(a) Under, and in pursuance of, our articles of partnership, in the business conducted under the firm name of —— and ——, I hereby notify you that I elect to purchase your interest in said business upon your withdrawal from said firm on ——, as per your notice of withdrawal to me of ——, ——, at the appraised value thereof, as provided in said articles of partnership.

(b) I hereby give you notice that it is my intention to purchase your share in the partnership which subsisted between us under articles of partnership dated the —— day of ——, 19—, for a term of —— years next ensuing, and which said term expired on the —— day of —— last, in pursuance of the powers and upon the terms and conditions contained in the above-mentioned articles of partnership.

§ 1142. Of intention to expel.

I hereby give you notice that it is my intention immediately to dissolve the partnership now subsisting between us, in pursuance of a power to that effect contained in our partnership articles on account of your neglect to keep proper and just accounts contrary to the stipulations and agreements therein contained, and also of your appropriation, without my consent, of moneys and effects of the partnership to your own separate use; and of your commission of other acts contrary to the said stipulation and agreements, whereby I am authorized, by giving you written notice to that effect, to expel you from the partnership, and I do therefore expel you from the partnership accordingly; and I do declare that the said partnership between us is this day dissolved, and that the business thereof shall from henceforth be carried on in my name only, but without prejudice, nevertheless, to any remedies which either of us may be entitled to as against the other for the breach of all, any, or either of the covenants or agreements contained in our said partnership articles previously to the dissolution.

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§ 1143. Of demand for inspection of business.

I hereby serve notice upon you that I herein make demand that you allow me to inspect the books and general business affairs of —— and company, a partnership composed of you and myself, and further notify you that I will be at the office of said firm on ——, at —— p. m., for the purpose of such inspection.

§ 1144. Of dissolution.

(a) Notice is hereby given that the partnership heretofore existing between ——, ——, and ——, under the firm name of —— and company, was on ——, ——, dissolved by mutual consent of all the members thereof

All persons indebted to said firm are requested to adjust said indebtedness with ——, who has been designated by all of said partners to close the business matters of said partnership.

All creditors of said firm are also requested to send statements of their claims to said ——, in order that they may be adjusted as soon as possible.

(b) Notice is hereby given that the partnership lately subsisting between the undersigned —— and ——, carrying on business as ——, at ——, under the style or firm of —— & Co., was on ——, 19—, dissolved by mutual consent, and that the business in future will be carried on by the said —— alone (who will pay and discharge all debts and liabilities, and receive all moneys payable to the said late firm).

§ 1145. Of retirement of partner.

Notice is hereby given that the partnership lately subsisting between the undersigned ——, —— and ——, carrying on business under the firm name of ——, at ——, as ——, was on the ——, 19—, dissolved by mutual consent, so far as regards the said ——, who retires from the firm.

§ 1146. Of sale of business.

Notice is hereby given that —— and ——, partners, lately doing business under the firm name of —— and ——, have sold

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their business, known as the hardware store at No. —— street, ——, ——, to —— ——, who will continue said business at the same location.

All persons indebted to, or having claims against, said firm of —— and ——, are requested to adjust such matters with either of the undersigned partners at the earliest opportunity.

§ 1147. To firm debtor after dissolution.

We hereby give you notice that the partnership lately subsisting between us, under the firm of —— & Co., was dissolved on the —— day of —— last, and we request you to pay the debt owing by you to us to Mr. ——, who is duly authorized to receive the same, and whose receipt shall be your sufficient discharge.

As witness our hands, this —— day of ——, 19—. To Messrs. —— (debtors).

Complete Agreements

§ 1148. Farm partnership contract.

First party shall let and lease to second party his farm, known and described as (description) for the period of ——, commencing ——, and ending ——, upon the following terms and conditions, to wit:

Second party shall do all the work on said farm, in a proper manner, shall furnish all tools and implements connected therewith, shall furnish and keep at all times hereunder —— horses, to be used upon said farm.

Second party shall cut noxious weeds on said farm; keep hedges properly trimmed; repair gates, fences and buildings with materials furnished by first party to the extent of keeping the same in as good condition as they now are or may be placed in by first party, and shall deliver first party's share of crops or stock at market, when sold, all without expense to first party.

Each party hereto shall furnish one-half the stock on said farm, also pay for one-half of all seeds, fertilizers, feed purchased, threshing bills and other expenses of said partnership not such as herein agreed to be paid by one of said parties, and

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each party shall receive one-half of the proceeds from said partnership.

Second party shall have, for his own use, the dwelling-house on said farm, shall have each year —— cords of firewood, cut from down timber, and may keep one cow at his own expense for feed, all without expense to first party therefor.

All purchases and sales, and the general conduct of said farm shall be upon the advice and consent of both of the said parties hereto.

§ 1149. Agreement for mercantile partnership.

This indenture, made this —— day of ——, 19—, between —— of ——, of the one part, and —— of ——, of the other part, witnesseth the following agreement:

The said —— and —— are to become and remain partners in the business of —— for the term of —— years from the date of this instrument, if both of them shall so long live.

That the business shall be carried on at No. —— in —— street, in —— aforesaid, on which premises a similar business is now being carried on by the said ——, or at any other place they may hereafter mutually agree to rent for that purpose;

That proper books of account shall be kept in the office on the said premises; and therein shall be duly entered, from time to time, all dealings, transactions, matters and things whatsoever in or relating to the said business; and each party shall have full and free access thereto at all times, but shall not remove the same from such depository;

That the capital requisite to carry on the said business shall be advanced by the said partners share and share alike, and the said capital, and all such stock, implements and utensils in trade, purchased out of the partnership funds, as well as the gains and profits of the said business, shall belong to the said partners share and share alike;

That each party shall be at full liberty to draw —— dollars monthly for his own private use, on account, but not in excess of his presumptive share of the profits, so long as the said business

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shall be carried on at a profit, and the capital advanced as aforesaid shall remain undiminished;

That neither party shall become bail or surety for any other person; nor lend, spend, give or make away with any part of the partnership property; or draw or accept any bill, note or other security in the name of the said firm, except in the due course of the said partnership business;

That an account of the stock, implements and utensils belonging to the said business, and of the book-debts and capital, shall be taken, and a statement of the firm affairs be made yearly, to be computed from the date hereof, when the sums drawn by each party during the preceding year shall be charged to his share of the firm profits; but if, at the end of any one year of the said partnership, it shall be found to be unprofitable, the said partnership may thereupon be dissolved, unless it shall be occasioned by some unavoidable loss or accidental circumstance;

That each party shall sign duplicate copies of each of such statements of affairs, and shall retain one of them for his own use; and another copy thereof shall be written in one of the partnership books, and likewise be signed by each of them; such accounts shall not again be opened, unless some manifest error shall be discovered in either of them, within —— months thereafter, and then so far only as respects the correcting of such error; and every such statement of affairs shall, in all other respects, be conclusive evidence between, and binding on, said parties;

That at the expiration or termination (by death or otherwise) of the said partnership, a valuation and similar account of the firm stock, effects and capital, and good will, if any, shall likewise be taken, stated, copied and signed and become equally conclusive; and the balance of such account then found to exist shall belong to the said parties share and share alike, and be realized and divided accordingly, and thereupon they shall execute mutual releases;

That all disputes and differences, if any, which may arise between the said parties shall be referred to, and decided by, two

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uninterested competent persons in or well acquainted with the —— trade, one to be chosen by either party, or by an umpire to be chosen by the referees in the usual course in such or similar cases; and their or his decision shall, in all respects, be final and conclusive on both the said parties, and shall be given, in writing, within —— days next after such submission, or within such further time, not exceeding —— days, as they or he shall require;

That either party may determine the partnership hereby created on breach of this agreement by the other of them, on giving unto the other of them —— calendar months' notice thereof in writing.

§ 1150. Mercantile partnership contract.

The said parties hereto hereby agree to form a partnership, under the firm name of —— & ——, from the date hereof until such time as either partner shall choose to discontinue said firm, by giving the other party at least —— weeks' notice thereof, before such dissolution, for the purpose of conducting a retail hardware store in the city of ——.

Said parties hereto shall each contribute —— dollars to said firm, and each party shall receive one-half the net profits of such business, and each party hereto shall bear one-half of any losses which said partnership may incur.

The net profits shall be computed as follows: In January of each year an inventory of all assets and liabilities of the firm shall be taken, and the total amount of the assets or liabilities, as shown thereby, when compared with the capital of said firm, as shown above, shall be the net profits or losses of said business.

No new capital, either of money contributed or of profits retained in the business, shall be used in said business, except by the consent of both parties hereto. First party hereto shall have active management of the sales department of said firm, and second party shall have charge of the office and accounts. First party shall draw a salary of —— dollars per week, and second

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party a salary of —— per week, both as part of the expense of said firm.

The place of business of said firm shall be at No. —— —— street, in said city of ——, unless another location is mutually agreed upon between said parties, and there shall be no change in the nature or scope of said business unless by the consent of both of said partners. Both of said parties shall give their full time and best efforts to said business. Second party shall supervise the books of said firm, and shall cause to be kept, proper books of account of all transactions of said firm, and each party hereto shall, at all times, have access to said books. Both of said partners may draw checks upon the firm account for firm purposes, and no other purposes, but neither of said partners shall issue any notes against said firm, nor mortgage firm property, nor borrow money, without the consent of the other party hereto.

First party shall purchase goods for the said firm, but shall not purchase in excess of the firm capital, nor shall he purchase goods of a different nature than general hardware goods, without the consent of second party hereto. In case of dissolution by mutual consent or otherwise, each party hereto shall be entitled to one-half of the net proceeds of said partnership property. In case either party, or both, withdraws from this partnership, the party offering the most for the other partner's interest shall, upon payment thereof within thirty days from said offer, be entitled to all the assets of said firm.

Neither party hereto can sell his interest in said firm to a third party, without the consent of the other party hereto.

In case one partner sells his interest in the firm to the other partner, the retiring partner shall not engage in the same business in said city of ——, except upon the written consent of the purchasing partner.

Office help shall be hired and discharged by second party, and the other employés by first party, but no employé may be retained after objection by either party hereto.

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§ 1151. Agreement between merchants.

This indenture, made this —— day of ——, 19—, between —— of ——, of the one part, and —— of ——, of the other part, witnesseth as follows:

The said —— and —— will become and remain partners in the business of —— for the term of —— years from the date of these presents, if both of them shall so long live.

Nevertheless the partnership shall terminate at the end of —— years from the date of these presents, if either partner shall desire its termination, and of such desire shall give not less than —— months' previous notice in writing to the other of them, or shall leave such notice at the place where the said business shall for the time being be carried on.

The firm name of the partnership shall be ——.

The business of the partnership shall be carried on at ——, or at such other place or places as the partners shall hereafter determine.

Each of them, the said —— and ——, will at all times diligently employ himself in the business of the partnership, and carry on the same for the greatest advantage.

Neither party shall, either directly or indirectly, engage in any business except the business of the partnership, and upon account thereof.

The capital of the partnership shall consist of the sum of —— dollars, to be brought in by the partners in equal shares.

The rent of the buildings where the said business shall be carried on, and the cost of repairs and alterations, and all rates, taxes, payments for insurance, and other outgoings whatsoever in respect of the same, and the wages of all persons employed in the said business, and all other moneys to become payable upon account of the said business, and all losses which shall happen in the same, shall be paid out of the capital of the partnership and the profits arising therefrom, or, if the same shall be deficient, by the partners in equal shares.

If either partner shall buy any goods or articles exceeding the value of —— dollars without the previous consent in writing of

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the other, such other partner shall have the option either to take such goods or articles on account of the partnership, or to let the same remain the separate property of the partner who shall have so bought the same.

Neither partner shall, without the previous consent in writing of the other, enter into any bond, or become bail or security for any person, or do, or willingly suffer to be done, anything whereby the capital or property of the partnership may be attached or taken in execution.

Each partner shall punctually pay his separate debts, and indemnify the other partner, and the capital and property of the partnership, against the same and all expenses on account thereof.

Books of account shall be kept by the partners, and proper entries made therein of all the sales, purchases, receipts, payments, engagements, transactions, and property of the partnership; and the said books of account, and all securities, papers, and writings of the partnership, shall be kept at the counting-house in —— aforesaid, or in such other place where the business shall be carried on, and each partner shall have free access at all times to examine and copy out the same.

On the —— day of —— in the year ——, and on the —— day of —— in every succeeding year, a general account shall be made and taken by the partners of all the sales, purchases, receipts, payments, engagements, and transactions of the partnership during the then preceding year, and of all the capital, property, engagements, and liabilities for the time being of the partnership; and the said general account shall, immediately after the same shall be made and taken, be written in two books, and be signed in each such book by each partner; and after such signature, each partner shall keep one of the said books, and shall be bound by every such account, except that, if any manifest error be found therein by either partner, and signified to the other partner within —— months after the same shall have been so signed by both of them, such error shall be rectified.

The partners shall be entitled to the net profits arising from the

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said business, and remaining after the payments hereinbefore directed to be made thereout, in equal shares.

In each year it shall be lawful for each partner to take out of the net profits of the said business, by equal monthly payments, the sum of —— dollars for his separate use; but in case, at the end of any year, it shall appear, upon taking the general annual account, that the net profits of such year shall not have amounted to the total yearly amount of the allowances to both partners, in such case, immediately after such general annual account shall have been taken, each partner shall repay to the partnership the excess (if any) of the amount of the sum which he shall actually have received in respect of such monthly payments over the sum which he shall have been entitled to receive as his share of the net profits of the said business.

Within —— months after the expiration of the partnership, otherwise than by the death of either partner, a general account shall be taken by the partners of all the capital, property, engagements, and liabilities of the partnership; and immediately after such last mentioned account shall have been so taken and settled, the partners shall forthwith make due provision for the payment of the debts and meeting all other liabilities of the partnership, and, subject thereto, all the property of the partnership shall be divided between the partners in equal shares; and such instruments in writing shall be executed by the partners respectively for facilitating the getting in of the debts due to the partnership, and for vesting the whole right in the said respective shares of the property in the partner to whom the same respectively shall upon such division belong, and for releasing to each other all claims on account of the partnership, and otherwise, as are usual in cases of the like nature.

This agreement, made, etc., witnesseth, that the said parties hereby, for themselves and their respective heirs, executors, and administrators, agree to become partners in the business of ——, under the firm of ——, for the term of —— years from the date hereof, upon the terms and conditions hereinafter stated:

That the business shall be carried on at No. —— in ——

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street, in —— aforesaid, on which premises the same is now being carried on by the said ——, or at any other place they may hereafter mutually agree to rent for that purpose;

That proper books of account shall be kept in the counting-house on the said premises; and therein shall be duly entered, from time to time, all dealings, transactions, matters, and things whatsoever in or relating to the said business; and each party shall have full and free access thereto at all times, but shall not remove the same from such depository;

That the capital requisite for carrying on the said business shall be advanced by the said partners in equal moieties, and the said capital, and all such stock, implements, and utensils in trade, purchased out of the partnership funds, as well as the gains and profits of the said business, shall belong to the said parties in equal moieties;

That each party shall be at full liberty to draw —— dollars monthly for his own private use, on account, but not in excess of his presumptive share of the profits, so long as the said business shall be found profitable, and the capital advanced as aforesaid shall remain undiminished;

That neither party shall become bail or surety for any other person; nor lend, spend, give, or make away with any part of the partnership property; or draw or accept any bill, note, or other security in the name of the said firm, except in the due course of the said partnership business;

That an account of the stock, implements, and utensils belonging to the said business, and of the book-debts and capital, shall be taken, and a statement of the affairs of the said partnership be made yearly, to be computed from the date hereof, when the sums drawn by each party during the preceding year shall be charged to his share of the profits of the said business; but if, at the end of any one year of the said partnership, it shall be found to be unprofitable, the said partnership shall thereupon be dissolved, unless it shall be occasioned by some unavoidable loss or accidental circumstance;

That each party shall sign duplicate copies of each of such

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statements of affairs, and shall retain one of them for his own use; and another copy thereof shall be written in one of the partnership books, and likewise signed by each of them; such accounts shall not again be opened, unless some manifest error shall be discovered in either of them, within —— months thereafter, and then so far only as respects the correcting of such error; and every such statement of affairs shall, in all other respects, be conclusive evidence between and binding on said parties;

That at the expiration or termination (by death or otherwise) of the said partnership, a valuation and similar account of the stock, effects, and capital, and good will, if any, of the said firm, shall be taken, stated, copied, and signed in like manner, and become equally conclusive; and the balance of such account then found to exist shall belong to the said parties in equal moieties, and be realized and divided accordingly, and thereupon they shall execute mutual releases;

That all disputes and differences, if any, which shall arise between the said parties, shall be referred to, and decided by, two indifferent, competent persons in or well acquainted with the —— trade, one to be chosen by either party, or by an umpire to be chosen by the referees in the usual course in such or similar cases; and their or his decision shall, in all respects, be final and conclusive on both the said parties, and shall be given, in writing, within —— days next after such submission, or within such further time, not exceeding —— days, as they or he shall require;

That either party may determine the partnership hereby created on breach of this agreement by the other of them, on giving unto the other of them —— calendar months' notice thereof in writing.

§ 1152. Professional partnership contract.

In consideration of the matters herein contained, the said parties hereby form a partnership for the purpose of ——, under the name of —— and ——, to continue for such a time as may be mutually agreeable, but neither party hereto may dissolve said

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partnership, without at least —— weeks' notice thereof, in writing.

All fees for professional services shall be divided as follows: —— to first party, and —— to second party. All office fixtures, supplies and expenses, together with all other expenses of said firm, shall be borne by said parties in the same proportion as fees are divided.

Both of said parties hereto shall give their whole time and best efforts to said firm, and neither shall engage in any business, for and in behalf of himself; but nothing herein contained shall be so construed as to prevent either of said parties from giving a reasonable amount of attention to investments which he now has or may acquire, so long as it does not interfere with his duties to this partnership.

Neither party shall draw any compensation for his said services, except as above set forth.

No business shall be accepted by either partner over the objection of the other partner, nor shall any method of advertising or of conducting any firm business, be adopted by either party hereto, which is objected to by the other party hereto.

§ 1153. Short form, partnership agreement between lawyers.

This agreement, made this —— day of ——, 19—, between —— of ——, —— of —— and —— of ——, witnesseth:

In consideration of mutual interests and profits to be derived therefrom, the undersigned attorneys hereby form a partnership under the name of ——, to continue for —— years from date; but any party may retire on one month's notice in writing.

All receipts by way of counsel fees or other business matters shall be divided after current expenses have been paid and deducted, whenever the same shall have been received, in the following proportions, to wit: Mr. —— shall receive ——, Mr. —— shall receive ——, and Mr. —— shall receive ——.

Each of said parties shall devote his whole time and attention to the business of said law firm, and shall not engage in any other

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business whatsoever, either on his own account or as agent, alone or in partnership with any other person or persons whatsoever.

Neither member of the firm shall become indorser or security in any manner for any other person without the consent of all the other members of the firm.

In witness whereof, etc.

§ 1154. Agreement between attorneys—Long form.

Indenture made the —— day of ——, 19—, between —— of ——, of the first part, and —— of ——, of the second part. The said parties agree to become partners as attorneys from the —— day of ——, during the term of —— years, subject to the provisions herein contained:

The partnership shall be carried on under the firm name of —— and ——. The business of the said firm shall be conducted at the offices now occupied by said ——, in the city of ——, or at such other place as the partners shall from time to time agree upon. The said ——, in whom the said offices are now vested by lease for the residue of a term of —— years, dated the —— day of ——, 19—, shall hold said lease, the demised offices, and the fixtures and furniture therein, in trust for and as part of the capital of the partnership, which shall indemnify him against the rent reserved and the covenants contained in said lease.

The capital of the partnership shall consist of the said leasehold offices and fixtures and furniture, the same being valued at the sum of —— dollars, and of such sum or sums of money as from time to time shall be required, and shall be contributed in such proportions as from time to time may be agreed upon between them; and each partner shall be entitled to interest upon the capital contributed by him at the rate of —— per cent. per annum.

All moneys received by the partners or either of them, on account of the partnership, shall be immediately deposited to the credit of the partnership in the —— Bank, and all checks shall be drawn in the name of the firm.

All rents, repairs, wages of clerks and servants, and other ex-

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penses that may be incurred in conducting the business, and all losses and damages happening in the same, shall be paid out of the profits of the partnership; and if the same shall not be sufficient, then by the partners in the shares in which they are entitled to the net profits.

The partners shall be entitled to the net profits of the business in the shares following, namely, etc., and they shall be divided as soon after the end of each year of the partnership as the general annual account shall have been settled.

The said —— may draw out of the profits by equal monthly payments the annual sum of —— dollars; and the said —— the annual sum of —— dollars, also by equal monthly payments; but if at the end of any year it shall appear that the share of any partner of the net profits in such year shall not amount to the sum already drawn by him, then he shall immediately refund to the partnership such sum as he may have drawn out in excess of his share of the net profits.

Each partner shall, during the partnership, devote his whole time diligently and faithfully to the partnership business, and he shall not, either alone or in conjunction with any other person, either directly or indirectly, engage in any other trade or business without the consent in writing of the other partner. He shall not undertake any professional business, or accept any office or trust, except for the benefit of the partnership. But either of said partners may, at his own cost and risk, do any business for his immediate or near relations or family connections without making any charge for the same; but in case he shall receive any fee or reward therefrom, the same shall go to the general account of the said partnership, and be accounted for accordingly.[1]

Neither partner shall undertake the prosecution or defense of

[1] In some cases it is provided that one partner shall have the income, profits, or salary arising from some particular trust or office or business, and for such cases the following clause, with variations according to circumstances, may be used:—

The said —— shall have the entire proceeds of his services in the management of the —— estate which he holds in trust. (Or, shall have the entire superintendence of the business of the —— corporation at his own risk and cost, and for his own sole and separate benefit.)

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any action or suit, or transact any professional business, after being requested in writing not to do so by the other partner.

Neither partner shall hire or dismiss any clerk or servant without the consent of the other partner.

Neither partner shall, without such previous consent, use any of the moneys or effects of the partnership, or pledge the credit of the partnership, except for the use or account thereof.

Neither partner shall, without such previous consent, compromise or release any debt or liability to the partnership.

Neither partner shall, without such previous consent, enter into any bond, or become bail, surety, or security with or for any person.

Each partner shall, during the partnership, pay promptly his present and future separate debts.

Proper books of account shall be kept, and entries made therein of all money expended and received by, and debts due to and from, and of all other matters and things relating to the partnership usually or properly entered in books of account kept by attorneys, and in particular each partner shall enter in proper books all charges for professional business transacted by him, with all necessary particulars relating thereto. Such books, and all papers, letters and writings relating to or belonging to the partnership, shall be kept and shall remain at the offices of the partnership, and each partner shall at all times have free access thereto.

On the —— day of ——, 19—, and on every —— day of —— in each succeeding year, a general account in writing shall be taken of all moneys, debts, and effects belonging or due to the partnership, and of all the liabilities thereof, and of all other things properly included in such an account. The share of the net profits of each partner, after deducting the amounts drawn by him, shall be carried to his credit on the books of the partnership immediately after such annual account shall have been stated, and may be drawn out at pleasure.

Upon the final determination of the partnership by lapse of time or otherwise, all deeds, drafts, and other papers relating to

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the business of the partnership shall, unless the client or clients to whose business the same relate object, be delivered to the partner who shall usually have attended to the business of such client or clients; and upon the death of any partner such deeds, drafts, and other papers shall, unless objected to as aforesaid, be delivered to the surviving partner.

Upon the determination of the partnership a full and general account in writing shall be taken in the manner provided for the taking of the general annual account, and a just valuation shall be made of all the particulars which are capable of valuation, and all debts due by the partnership shall forthwith be paid, the capital contributed by each returned, and the residue of the partnership property and moneys shall be divided between the partners or their representatives in the proportion in which they are at the time of dissolution entitled to the net profits of the partnership; and such instruments in writing shall be executed for collecting the outstanding debts of the partnership, for vesting the property in said debts and effects in the party to whom the same shall upon such division belong, and for releasing to each other all claims on account of the partnership in the manner usual in cases of a like nature.

If either of the said partners shall happen to die during the continuance of the said partnership, the surviving partner shall be at liberty to take at a fair valuation, to be made by some disinterested person to be appointed by such surviving partner and the executors or administrators of the deceased partner, the office, furniture, books, papers, stationery, and all such other effects and things as shall have been used in the said partnership business: provided, that payment for the same be made within one calendar month next after such valuation shall be made; and upon such payment being made, the executors or administrators of such deceased partner shall duly assign unto him the said office, furniture, books, papers, stationery, and effects. In witness, etc.

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§ 1155. Agreement where one partner is dormant.

Indenture made the —— day of ——, A. D. 19—, between —— and ——, heretofore partners under the style of ——, parties of the first part; and —— of ——, party of the second part:

Whereas, the said parties of the first part have heretofore carried on the business of —— as partners under and by virtue of articles of partnership, dated the —— day of ——, 19—;

And, whereas, the said parties of the first part are desirous of increasing the capital of their said business, for the purpose of more effectually carrying on the same, and have agreed to admit the said party of the second part into partnership with them, upon the terms and conditions hereinafter contained, upon his advancing the sum of —— dollars, to be added to the said partnership estate and effects:

Now this indenture witnesseth, that in pursuance of the said recited agreement, and in consideration of the sum of —— dollars, to be advanced and brought in by the said party of the second part to the account of the said partnership, at or before the execution hereof, each of them, the said partners, do, and each of them doth hereby for himself, his heirs, executors, and administrators, covenant and agree with the others of them, his executors and administrators, in manner following: that they will be partners in the said business of —— for the term of —— years, commencing from the —— day of ——, subject to the stipulations and agreements hereinafter contained;

That the capital of the said partnership shall be the sum of —— dollars, to be brought in by the said partners in the following proportions, namely: the said parties of the first part shall bring in the sum of —— dollars, the original capital of the said partnership, under the said hereinbefore recited indenture of the —— day of ——, and being one-third of the said partnership capital; and the said party of the second part shall bring in the sum of —— dollars so agreed to be advanced by him as aforesaid, being two-thirds of the said partnership capital, which said last mentioned sum of —— dollars shall be paid by the said party of the second part into the —— Bank to the credit of the said

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partnership, on or before the —— day of —— next; and the said partners shall be considered as creditors with respect to such capital, and shall be allowed interest thereon at the rate of —— per cent. per annum;

That the business of the said partnership shall be carried on at the present store, warehouse, and premises, or at such other place or places as the said partners shall from time to time agree upon, under the same style and firm, and in the same manner in all respects (except so far as the same is altered hereby), as the said partnership business has been hitherto carried on by the said parties of the first part;

That the said partnership business shall be managed and carried on, and all purchases, sales, bills of parcels, orders, notes, letters, bills, receipts, payments, contracts, securities, dealings, and transactions which shall be made, given, or taken for any matter or thing concerning the same, shall from time to time be so made, given, taken, and entered into in the name of the said parties of the first part;

That all goods, wares, and merchandise bought and sold, received in or delivered out, and the prices for which the same were bought and sold, and all moneys, payments, securities, and dealings in general relating to the said partnership business, shall be daily charged and entered by the said parties of the first part in proper books for that purpose, and in particular that a book shall be kept for the entry of the account of cash received and paid on the said partnership account;

That the said parties of the first part shall, during the continuance of the said partnership, be the keepers of the cash, bonds, bills, notes, and other securities belonging to the said partnership, and shall balance the said partnership accounts once in every month in such manner as to exhibit the true state and condition of the affairs of the concern; and that the said cash-book, and all books of account, bonds, bills, notes, letters, vouchers, and securities, shall be kept in the office belonging to the said business, or other place where the said partnership business shall be carried on, and be open at all times during the

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regular hours of business to the inspection of all the said partners, who shall, without hindrance or denial, be permitted to take copies or extracts therefrom.

That if at any time during the continuance of the said partnership any cash, or bills, or other securities shall be received by the said party of the second part on the partnership account, he will immediately pay over the same to the said parties of the first part; and in case of making default in such payment as aforesaid for the space of —— days, then, and in every such case, a sum equal to —— dollars per cent. on the sum so detained or withheld shall be charged against the said party of the second part by way of liquidated damages and not by way of penalty, and shall be retained out of his share of the profits of the said business, and added to the capital of the said partnership for the general benefit of the whole concern;

That the parties of the first part will, at all times during the continuance of the said partnership, devote the whole of their time and skill, and to the best of their abilities carry on all the affairs of the said partnership, and shall not nor will, at any time during the continuance of such partnership, either directly or indirectly, be concerned in any other trade, business, or profession whatsoever;

That the said party of the second part shall not be required to bestow any attention, or to act in any way in the said business any further than he shall think fit; nor shall he, during the continuance of the said partnership, or at any other time, be prevented from carrying on any other business or trade, excepting that of ——, or any other profession or employment whatsoever, either on his own account or in partnership with any other person or persons;

That the profits of the said joint partnership concern, after deducting all such expenses as aforesaid, shall be divided into —— equal portions, and that the said parties of the first part shall each receive —— parts of the said profits; the said party of the second part shall receive the remaining —— parts; and all

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losses incurred in the course of the said business shall be borne in the same proportions, unless the same shall be caused by the wilful neglect or default of either of the said partners, in which case the loss so incurred shall be made good by the partner through whose default it shall arise;

(Insert any appropriate general clauses, such as requirement to pay private debts, prohibiting becoming surety, etc.)

That all moneys advanced by either of the said partners on the joint partnership account, with the approbation of the others of them, and all sums of money which either of them, with such approbation as aforesaid, shall permit to remain in the said business, which, by the rules herein prescribed, he may be at liberty to draw out as part of his ascertained profits thereof, shall be passed to his credit in the partnership account, and be entered in the books of the said partnership, and bear interest at the rate of —— per cent. per annum for so long a time as the same shall be so permitted to remain therein, and shall be considered as a distinct loan, as if the same had been borrowed from any other person, and be accounted for and paid to him before any division shall be made of the profits of the said partnership;

That the said party of the second part shall, from time to time, be allowed to draw out of the said partnership business weekly, and for his private expenses, any sum or sums of money not exceeding the sum of —— dollars; and that the said parties of the first part shall in like manner be respectively allowed from time to time to draw out of the said partnership business weekly, for their own private expenses, any sum or sums of money not exceeding the sum of —— dollars each; all such sum and sums of money, from the time of drawing out the same, to be entered in the cash-book belonging to the said partnership, and to be duly accounted for by the said parties respectively, on every settlement of accounts and division of the profits of the said partnership;

(Insert general clauses for stating annual account, and for general account on dissolution.)

That if either of the said partners shall be desirous of determining the said partnership at any time before the expiration of

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the said term of —— years, he shall be at liberty so to do, on giving —— calendar months' previous notice in writing of such his desire to the others, or either of them, or leaving the same at the counting-house of the said partnership, and such partnership shall determine at the expiration of such —— calendar months, or at such future day as in such notice shall be named, and the continuing partners shall have the privilege of taking the whole of the partnership business, at the rate at which the same shall be appraised and valued, on paying his or their shares of such valuation to the retiring partner;

That in case of the death of either of the said partners before the expiration of the said term of partnership, the surviving partners will settle and adjust all accounts, matters, and things relating to the said partnership, with the executors or administrators of such deceased partner; but the surviving partners shall have the option of taking the whole of the said partnership property at a valuation, the amount of which shall be determined by the award of two arbitrators, or their umpire, in the usual manner, and the costs of making such valuation shall be paid by the surviving partners and the executors or administrators of the deceased partner, according to their respective proportions in the said partnership business.

In witness, etc.

§ 1156. Extension of partnership term indorsed on articles.

Indenture made the —— day of ——, between —— of ——, of the first part; —— of ——, of the second part; and —— of ——, of the third part. Whereas the partnership entered into by the above-named parties under the within-written indenture will expire by limitation on the —— day of —— next; and whereas the said parties thereto have agreed to continue the said partnership for the further term of —— years from the said —— day of ——, in manner hereinafter expressed:

Now this indenture witnesseth, that each of them, the said ——, —— and ——, hereby covenants with the others of them, and their executors and administrators, jointly and severally, in

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manner following, that is to say, that they, the said ——, —— and ——, and the survivors of them, will remain and continue partners together in the within-mentioned trade or business for the further term of —— years, to be computed from the said —— day of —— next, upon the same terms and conditions, and subject to the same provisions and agreements, as are in and by the within-written indenture expressed and contained in relation to the partnership thereby constituted, and so that all such terms, conditions, provisions and agreements shall remain in force and take effect in like manner as if the said partnership had been originally entered into for the full term of —— years, instead of the said term of —— years.

In witness, etc.

§ 1157. Continuation of business under new agreement.

This agreement, made this —— day of ——, 19—, between —— of ——, —— of ——, and —— of ——, all of the city of ——, witnesseth:

Whereas, said parties have for —— years last past been engaged in the business of ——, in the city of ——, under the firm name and style of —— and Company, and are desirous to continue said business under new articles of partnership.

Now, therefore, the said parties for, and in consideration of the premises, and of the mutual covenants herein contained and of the sum of $1 to each in hand paid by the other, the receipt whereof is hereby acknowledged, do hereby covenant and agree as follows:

Said business shall be carried on in all respects as heretofore, except as modified by this agreement, and shall be conducted under the firm name and style of —— and Company. The main office and place of business of said company shall be at No. —— street, in said city of ——.

Said partnership shall commence as of the date of the —— day of ——, 19—, and shall continue for the term of —— years from date, except as herein provided.

The money which shall be in said business to the credit of

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said partners of said firm on the —— day of ——, 19—, shall remain, except as otherwise provided, as the capital of the various partners in said business, and subject to the terms of this agreement. Regular account books shall be kept of all transactions of the firm, and each partner, or his legal representative or agent, shall have free access thereto for the purposes of inspection, examination and copying. In all other respects, the finances and affairs of the firm shall be conducted as hitherto.

On the —— day of January of each year during the continuance of said term, a full written account shall be made and taken of all the stock in trade, money, assets, credits and things belonging to and owing to said firm, and of all such matters as are generally included in annual accounts. Each partner's interest in the capital and effects of the firm shall be ascertained, and a balance sheet shall be made out and corresponding entries placed upon the books of account, so that the true condition of the firm and of each partner therein may be actually known, in order that the amount of net profits earned may from time to time be credited on said books of account to the respective partners in the proportions and amounts to which they shall be severally entitled. In finding out the amounts due upon said balance sheets, all expenses of the business shall be charged up and also all losses and other charges incident or necessary to the carrying on of said business.

The financial management of the firm shall be in charge of ——, and each of the other partners shall devote his time and energy exclusively to the firm's business, and during the continuance of this partnership shall not be engaged or interested in any other business.

After the payment of the expenses and charges heretofore mentioned, the net profits of said business shall be divided among the said partners according to the proportion hereinafter specified, and the losses shall be borne in the same proportion; said first-named party —— per cent., said second-named party —— per cent. thereof, and said last-named party —— per cent. thereof.

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Said partners shall be entitled to draw from said business in each year, on accounts of profits due to them respectively, sums of money not exceeding the following amounts, said money to be drawn in equal monthly instalments: said first-named party —— dollars, said second-named party —— dollars, and said last-named party —— dollars.

It is further agreed that the death of any of the parties hereto during the term of this agreement shall not operate to dissolve said partnership, but the same shall be carried on by the survivors until such time as said partnership shall expire by the terms hereof. The partnership capital shall remain unimpaired and no part thereof, except as above provided, shall be withdrawn by the legal representatives of any deceased partner before the expiration of this agreement, but such representatives shall be entitled to all payments and credits which said partner would have received if living, but shall have no right of active control or interference in said business. Such representative shall, however, have all other rights, including that of access to books of account of said firm which would have belonged to such deceased partner.

If no written notice shall be given by any of the parties hereto to the others within three months before the expiration hereof, of his or their desire to determine and dissolve said partnership at the date fixed for said termination, then said partnership shall continue for one year after said expiration, upon the same terms as herein provided, and shall thereafter continue from year to year until three months' written notice shall have been given by any of said partners or the legal representative of any deceased partner, at the time and in the manner herein specified.

None of said parties hereto shall, without the consent of all the other parties, in any way use the firm name or credit, directly or indirectly, for purposes of indorsement, guaranty or otherwise, except for firm business, and none of the parties shall, without like consent, become indorser, guarantor or surety for any other purpose, except for firm business.

In witness, etc.

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§ 1158. Admission of new partner.

Agreement made this —— day of ——, 19—, between —— and ——, constituting the firm of —— & Co., of the first part, and —— (incoming partner), of the second part:

Whereas, by a written agreement, dated the —— day of ——, 19—, between the said first parties, they became partners in the business of ——, for the term of —— years, and have since continued to be partners;

And whereas the said partners have agreed to admit the said (incoming partner) into partnership with them in the said business, for the residue of said term of —— years, upon the terms and conditions hereinafter mentioned, and upon the preliminary agreement for such partnership it was agreed that a valuation should be made of the whole of said partnership property and effects and that the said (incoming partner) should pay unto the said first parties one-third of the amount of such valuation, and be admitted to a proportionate share of the profits and losses of the said business;

And whereas such valuation has been made accordingly, and the value of the said partnership property fixed at the sum of —— dollars:

Now this indenture witnesseth, that in pursuance of the said recited agreement, and in consideration of the sum of —— dollars, being one-third of the valuation of the said partnership property, paid by the said (incoming partner) to the said first parties, the said first parties admit the said (incoming partner) as a partner in the said business for the term of —— years from the date hereof, which said business shall henceforth be carried on under the style or firm name of ——; and the profits and losses of the said partnership shall be equally divided and borne by the said parties hereto, and the said partnership business shall be carried on by them under and subject to the same terms, covenants, stipulations, provisos, declarations and agreements as are expressed and contained in the said hereinbefore recited written agreement of partnership of the —— day of ——, of and concerning the said capital, stock in trade and effects, and all and

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singular the other matters and things therein mentioned and comprised, and that as fully and effectually to all intents and purposes as if the same terms were expressed and contained herein and inserted with the name of the said (incoming partner) herein.

Subject to the covenants, stipulations, provisos, declarations and agreements so contained in the said hereinbefore recited indenture as aforesaid, the said partnership estate and effects shall be and remain unto the said three partners constituting the said new firm of ——, their respective executors, administrators and assigns, in equal shares and proportions.

In witness, etc.

Miscellaneous Agreements and Forms

§ 1159. Indorsement on articles of agreement to admit new partner.

Memorandum of agreement made the —— day of ——, 19—, between the above-named —— and ——, of the first part, and —— of ——, of the second part: Whereby, in consideration of the sum of —— dollars, now brought in and contributed by the said second party as additional capital of the above-named partnership, it is hereby agreed as follows:

The parties hereto shall, as from the date hereof, be and continue partners for the unexpired residue of the above-mentioned term, subject in all respects to the conditions, stipulations and provisions of the above-written articles, so far as applicable, and except as varied by this present agreement.

The capital of the partnership shall be deemed to be the sum of —— dollars, and to have been contributed by the parties hereto in the shares and proportions following: that is to say, two equal fifth shares by the said ——; two other equal fifth shares by the said ——; and the remaining one equal fifth share by the said ——.

The profits and losses shall belong to and be borne by the parties hereto in proportion to their respective shares.

The said —— and —— may draw out of the profits the sums

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mentioned in the above-written articles— and the said —— may draw out of the profits money not exceeding —— dollars each month.

In witness, etc.

§ 1160. Admission of partner's son into firm.

Indenture made the —— day of ——, between ——, of the first part; —— and ——, of the second part; and ——, of the third part. Whereas, by certain articles of partnership dated the —— day of ——, 19—, the said parties of the first and second parts became partners for the term of —— years, under the firm of ——, and it was contemplated and provided by said articles that said party of the third part, the son of said party of the first part, should at some future time become a partner in said firm; and whereas, in pursuance of such provision, the said party of the first part is now desirous of introducing his said son as a partner into the said firm for the residue of the said term, and to assign to him one equal —— part of the share of him, the said party of the first part, but subject to the restrictions and provisions hereinafter contained: Now this indenture witnesseth, that for effectuating the said desire, and in pursuance of the said provisions contained in the said articles, the said party of the first part, with the consent hereby testified of the said parties of the second part, doth hereby introduce the said party of the third part as a partner into the said firm, upon the terms and subject to the restrictions and provisions hereinafter contained; and the said party of the first part doth hereby assign unto the said party of the third part, his executors, administrators, and assigns, one equal —— part of the share of him, the said party of the first part, in the capital, stock in trade, assets, good will, and profits of the said firm as from the —— day of ——; to hold the same unto the said party of the third part, his executors, administrators, and assigns, absolutely, subject as hereinafter mentioned. And this indenture also witnesseth, that in consideration of the premises he, the said party of the third part, doth hereby for himself, his heirs, executors, and administrators, covenant with the

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said parties of the first and second parts, their executors, and administrators, and, as separate covenants, with each of them, his executors and administrators, and each of them, the said parties of the first and second parts, doth hereby for himself, his heirs, executors, and administrators, covenant with the said party of the third part, his executors and administrators, that they, the said parties of the first, second, and third parts, will henceforth become and remain partners in the said business of ——, for the unexpired residue of the said term of —— years, under and subject to the stipulations and provisions contained in the said indenture of the —— day of ——, 19—, with such variations as are rendered necessary by the admission of the said party of the third part into the said business, and the assignment to him of the said —— part of the said share of the said party of the first part; and will perform and observe such of the same covenants, stipulations, and provisions, with such variations as aforesaid, as are now subsisting and capable of taking effect, in the same manner, so far as the circumstances will admit, as if the said party of the third part had originally been made a party to the same indenture.

In witness, etc.

§ 1161. Admission of partner's legatee into firm.

Indenture made this —— day of ——, 19—, between —— of —— *(legatee of deceased partner)*, of the first part; —— of —— *(executor of the deceased partner)*, of the second part; and —— and —— *(surviving partners)*, of the third part: Whereas the said ——, deceased, and said surviving partners carried on the business of ——, as partners, pursuant to the provisions of articles of copartnership, bearing date the —— day of ——, from the date of the execution thereof up to the time of the death of said ——, which occurred on the —— day of ——, 19—; and whereas the said —— executed a will bequeathing his share in the property and business of said partnership to his son, the said ——, and said will was duly proved in the probate court of the county of ——, at ——, on the —— day of ——, 19—.

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and the said —— was duly appointed executor; and whereas the said executor has assented to said legacy, and in testimony of such assent joins in these presents; and whereas the said surviving partners, in pursuance of a provision contained in said articles of copartnership, have agreed to admit the said *(legatee)* into the said partnership upon his entering into the covenants hereinafter contained: Now this indenture witnesseth, that the said surviving partners hereby admit the said *(legatee)* into partnership with them in respect of the share of the said ——, deceased, subject to and with the benefit of the stipulations and provisions contained in the said articles of copartnership; and the said *(legatee)* doth hereby for himself, his heirs, executors, or administrators, covenant with the said surviving partners and each of them, their and each of their executors and administrators, that he will henceforth become and remain a partner in respect of the share of the said ——, deceased, so bequeathed to him as aforesaid in the said business, for the unexpired residue of the term of said copartnership, under and subject to the stipulations and provisions contained in said articles of copartnership, and will perform and observe such of the said stipulations and provisions as are now subsisting and capable of taking effect, in the same manner, so far as the circumstances will admit, as if the said *(legatee)* had originally been made a party to the said articles, instead of the said *(deceased partner)*.

In witness, etc.

§ 1162. Agreement by continuing partners to purchase retiring partner's share.

Agreement made the —— day of —— between —— and ——, continuing partners, and ——, retiring partner.

The partnership heretofore carried on by said partners in the business of ——, under the name of ——, wherein the said three partners were entitled to the profits and liable to the losses of said business in equal shares, shall be deemed to have been dissolved by mutual consent as and from the —— day of —— last, and

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the said business shall as from that date be carried on by the continuing partners.

The continuing partners shall pay to said retiring partner, at the dates and by the instalments hereinafter mentioned, the sum of —— dollars as the purchase-money for his share and interest in said partnership and the capital, property and good will thereof.

The said purchase-money shall be paid to said retiring partner as follows: the sum of —— dollars upon the execution hereof, and the balance in equal instalments of —— dollars each, payable at the expiration of successive periods of —— calendar months each from the date hereof, together with interest at the rate of —— per cent. per annum on so much of said balance as shall for the time being remain unpaid.

The said retiring partner shall not for the period of —— years from the date hereof carry on or be engaged, either directly or indirectly, and either as principal, clerk or agent, in the said business of —— within the state of ——, and shall not at any time hereafter interfere with or endeavor to divert any of the business carried on by the continuing partners. In the event of any breach of the restrictions in this clause contained by said retiring partner, he shall pay to the continuing partners the sum of —— dollars as liquidated damages.

The continuing partners shall be at liberty, if they shall think fit, to use the name of the retiring partner as part of the firm name in the business intended to be carried on by them; that is, continuing the firm name heretofore used, for the period of —— years from the date of this agreement.

The continuing partners shall have the right to collect all moneys and assets of the said late partnership and may sue for, recover and receive and give effectual receipts for all debts in any wise owing and for all effects belonging to said late partnership and to settle all accounts and matters relative to said business, and to compound for or release all debts or claims belonging thereto, and to institute any actions or proceedings for compelling payment or delivery thereof, and for such purpose to use the name of said retiring partner.

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The debts and liabilities of the said partnership estimated to amount to the sum of —— dollars and taken into account at that sum in estimating the value and purchase-money aforesaid, shall be paid and discharged by the continuing partners, who shall indemnify the said retiring partner therefrom, and from all actions, costs, claims and demands in respect thereof.

Each of the parties shall sign and execute such further deeds or papers as the other party shall reasonably require for effectuating this agreement.

The expression "continuing partners" shall be deemed to include their successor or successors for the time being in said business so intended to be carried on by them.

In witness, etc.

(Signatures of all parties.)

§ 1163. Agreement for sale by retiring partner of his share in partnership to incoming partner, with concurrence of continuing partners.

Indenture made the —— day of ——, between —— of —— (retiring partner), of the firm of —— & Co., hereinafter called the vendor; —— and —— (continuing partners); and —— (incoming partner), hereinafter called the purchaser.

The said vendor, with the approval hereby testified of the said continuing partners, agrees to sell, and the said purchaser agrees to purchase, all the share and interest of the said vendor in the good will of the business of ——, as the same is now carried on by the said vendor in partnership with the said continuing partners, under the firm name of —— & Co., and in the assets, property and capital of the said partnership, and in the profits thereof, as from the —— day of ——.

The purchase-money shall be the sum of —— dollars, but the said purchaser shall be entitled to deduct from the purchase-money all moneys now already or at any time before completion to be drawn out by the said vendor in anticipation of his share of profits for the current year.

The purchase shall be completed on the —— day of ——, at

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the office of said firm, at which time and place the said vendor shall, upon payment of the purchase-money (subject to such deduction, if any, as aforesaid), execute a proper assignment of the said premises to the said purchaser, with such powers of attorney and other provisions as may be proper. And if from any cause whatever, other than the wilful default of the said vendor, the purchase shall not be completed on or before that day, the said purchaser shall pay to the said vendor interest on the purchase-money (after making such deduction as aforesaid), at the rate of —— per cent. per annum from that day until completion.

Proper instruments shall be executed for the indemnity of the said purchaser by the said vendor from all the debts, liabilities, and engagements of the firm, if any, entered into, accepted or given before the said —— day of ——, which do not appear in the books of the said partnership, and for the indemnity of the said vendor and his representatives against all the outstanding debts, liabilities and engagements of the firm which appear in the books of the partnership.

The said continuing and incoming partners shall, upon the completion of the said purchase, execute an agreement containing mutual covenants by the said continuing and incoming partners to be and remain partners in the said business of —— for the residue of the term of —— years from the —— day of ——, upon the terms, and subject to the agreements and provisions, contained in the said articles, with such variations as are rendered necessary by the introduction of the said purchaser as a partner, and the assignment to him of the share and interest of the said vendor, and for the performance and observance of the said agreements and provisions, with such variations as aforesaid, in the same manner, as far as circumstances will admit, as if the said purchaser had originally been a party to the said articles.

In witness, etc.

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§ 1164. Assignment by retiring partner to continuing partner.

Indenture made the —— day of ——, between —— of ——, of the one part, and —— of ——, of the other part: Whereas the said parties have for some years past carried on the business of ——, at ——, under the provisions of articles of partnership, dated, etc.; and whereas the said partners are possessed, as part of their partnership property, of a lease dated, etc., and of certain fixed and movable engines, machinery, plant, stock in trade, and other effects; and whereas it has been agreed between the said partners, that the said partnership shall stand dissolved as from the —— day of ——, and a notice of such dissolution has been signed by the said parties, to be published in the ——, and it has been agreed that as from that day the said business shall belong to and be carried on by the said ——, the continuing partner, solely, and that the share and interest of the said ——, the retiring partner, in the assets and good will of the said partnership shall be assigned and made over to the said continuing partner, on his taking upon himself the whole of the debts and liabilities of the said partnership which were outstanding on the said —— day of ——, and paying to the said retiring partner the value of his share and interest in the said partnership, and the assets and good will thereof, as the same stood on that day; and whereas an account and valuation has been taken and made by the said partners of the said business, and the assets and good will thereof, and the value of the share and interest of the said retiring partner therein, after providing for the payment and satisfaction of the debts and liabilities thereof on the said —— day of ——, has been ascertained to be the sum of —— dollars: Now this indenture witnesseth, that in pursuance of the said agreement in this behalf, they the said parties do hereby declare that the said partnership between them shall be considered as determined and stand dissolved as from the said —— day of ——; and that in pursuance of the said agreement, and in consideration of the premises and of the sum of —— dollars now paid by the said continuing partner to the said retiring partner,

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he doth hereby assign and transfer unto the said continuing partner, his executors, administrators, and assigns, all the part or share and interest whatsoever of him, the said retiring partner, of and in all and singular the leasehold and premises hereinbefore mentioned or referred to, and of and in all and singular the engines, machinery, whether fixed or movable, plant, stock in trade, book and other debts, credits, contracts, assets, effects, profits, business, and good will of the said partnership: to hold all the said premises unto the said continuing partner, his executors, administrators, and assigns, absolutely. And for the consideration aforesaid, and for the more effectually enabling the said continuing partner, his executors, administrators, and assigns, to receive and recover and obtain the benefit of the premises hereby assigned, the said retiring partner doth hereby irrevocably appoint the said continuing partner, his executors, administrators, and assigns, the attorney or attorneys of him, the said retiring partner, his executors or administrators, in the joint names of the said partners, or in the name or names of the said retiring partner, his executors or administrators, or otherwise, as the case may require, but for the exclusive benefit and at the sole cost and risk of the said continuing partner, his executors, administrators, or assigns, to demand, call in, and receive from all persons liable to pay, deliver, or account for the same, or any part thereof, all and singular the book and other debts, credits, moneys, and effects of the said partnership, and to give effectual receipts and discharges for the same respectively, and to indorse bills and other negotiable instruments, and to use and adopt all such remedies, proceedings, or means for getting in and recovering the said debts, credits, moneys, and effects respectively, and enforcing and obtaining the benefits of any of the contracts of the said partnership as may be deemed expedient, and for all or any of the purposes aforesaid from time to time to appoint a substitute or substitutes, and such substitution at pleasure to revoke, and generally to do whatsoever may be requisite for giving to the said continuing partner, his executors, administrators, or assigns, the full benefit of the assignment hereby made;

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and the said retiring partner doth hereby covenant with the said continuing partner, his executors, administrators, and assigns, that he, the said retiring partner, has not at any time heretofore, except as appears by the books of the said partnership, contracted any debt or obligation which can or may charge or effect the said continuing partner, his executors, administrators, or assigns, or the assets or effects of the said partnership, or any part thereof, or received or discharged any of the said debts, credits, moneys, or effects, except as aforesaid; and that he, the said retiring partner, his executors or administrators, will at all times ratify and confirm whatsoever the said continuing partner, his executors, administrators, or assigns, or any substitute or substitutes acting under him or them, shall do or purport to do by virtue of these presents; and will not compound, release, or become nonsuit in any action or proceeding which may be instituted or taken by the said continuing partner, his executors, administrators, or assigns, by virtue of the power of attorney hereinbefore contained, nor do any other act by means whereof the recovery of the premises hereby assigned, or any part thereof, may be impeached or delayed, nor interfere in or about the premises further or otherwise than the said continuing partner, his executors, administrators, or assigns, shall direct or require. And the said continuing partner doth hereby covenant with the said retiring partner, his executors and administrators, that he, the said continuing partner, will in due course pay all the debts and discharge all the liabilities of the said partnership, including therein the rents and covenants to be paid and performed in respect of the said leasehold premises; and will, at all times hereafter, effectually keep indemnified the said retiring partner, his executors and administrators, and his and their estate and effects, against all such debts and liabilities, and all actions, proceedings, costs, and expenses in respect thereof, and all costs and expenses by reason of any action or proceeding which may be instituted or taken by the said continuing partner, his executors, administrators, or assigns, by virtue of the power or authority hereinbefore contained, or of anything relating thereto. And each of

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them doth hereby release and forever discharge the other of them, his heirs, executors, administrators, and assigns, from all actions, proceedings, claims, and demands whatsoever, which such respective releasing party, or his heirs, executors, administrators, or assigns, now has or hereafter might have had against the other of them, his heirs, executors, administrators, or assigns, on account of the said partnership, or anything relating thereto, but so nevertheless that this present release shall not prejudice or affect any of the covenants, agreements, or provisions herein contained, or the rights or remedies of the said respective parties, their heirs, executors, administrators, or assigns, hereunder.

In witness, etc.

§ 1165. Assignment to surviving partner of deceased partner's share.

Indenture made the —— day of ——, 19—, between —— and ——, executors of the will of ——, deceased partner, of the one part, and ——, surviving partner, of the other part: Whereas by articles of partnership dated the —— day of ——, 19—, the said ——, deceased, and the said surviving partner became partners in the business of —— for the term of —— years; and whereas it was stipulated by said articles (recite provision empowering surviving partner to buy deceased partner's share); and whereas the said —— died on the —— day of ——, having made a will which was duly proved in the probate court for the county of ——, on the —— day of —— following, and the said —— and —— were duly appointed and qualified as executors; and whereas the said surviving partner has settled and adjusted all the partnership accounts with the said executors in pursuance of the stipulations contained in said articles; and whereas the said surviving partner has signified his desire to purchase the share of the said deceased partner in the partnership effects, and a valuation thereof has been made and agreed upon between the said executors and the said surviving partner, such valuation being the sum of —— dollars; and whereas the said surviving partner has this day executed and delivered to

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said executors his bond in the penal sum of —— dollars, conditioned for the payment of the said sum of —— dollars, with interest thereon at the rate of —— per cent. per annum, by four equal instalments at three, six, nine, and twelve calendar months from the date hereof; and also for indemnifying the said executors against any costs or damages for or on account of said partnership business: Now this indenture witnesseth, that in consideration of the premises they, the said executors, do hereby assign unto the said surviving partner, his executors, administrators, and assigns, all that —— undivided part or share of the said deceased partner in and to all the goods, credits, and effects belonging, due, and owing to the said partnership; and all the right, title, and interest of the said deceased partner, and of the said executors therein, with full power and authority to the said surviving partner, his executors or administrators, as the attorney or attorneys irrevocable of them, the said executors, and in their names, or in the name of the survivor of them or of the said deceased partner, but at the sole cost and expense of the said surviving partner, to demand, recover, and receive the said partnership credits and effects, and to give effectual receipts and discharges for the same, and to appoint a substitute or substitutes for any or all of the purposes aforesaid: to have and to hold the said —— part or share of the said goods, credits, and effects unto the said surviving partner, his executors, administrators, and assigns, for his and their own use, forever. And the said executors do hereby confirm all and whatsoever the said surviving partner, his executors and administrators, or his or their substitute or substitutes, shall lawfully do or cause to be done in the premises by virtue of these presents, and will not receive or discharge any of said partnership credits, nor interfere with any action brought by the said surviving partner, his executors or administrators, in respect of the said assigned premises.

In witness, etc.

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§ 1166. Conveyance of share of retiring partner to co-partners.

Indenture made this —— day of ——, 19—, between ——, retiring partner, of the one part, and —— and ——, continuing partners, of the other part: Whereas the said parties have carried on the business of —— in copartnership up to the —— day of ——, and are entitled in fee, as part of their partnership property, to the buildings and lands described in a certain deed made by —— to said partners, dated the —— day of ——, and recorded in —— county registry of deeds, book ——, page ——, and to the buildings and lands specified in an indenture of lease dated the —— day of ——, and made by —— to the said partners for a term of —— years from the —— day of ——, at the yearly rent of —— dollars, and to the fixed machinery and other erections and fixtures upon the said respective freehold and leasehold premises, in the shares and proportions following, that is to say, the said retiring partner to —— equal —— parts thereof, and the said continuing partners to the remaining —— equal —— parts thereof; and whereas the said retiring partner has retired from the said firm as from the said —— day of ——, and the said continuing partners continue to carry on the said business of —— in copartnership together; and whereas the said continuing partners have come to a settlement with the said retiring partner in respect of his share and interest in the said partnership, and the assets and effects thereof, and it has been agreed that they should pay to the said retiring partner the sum of —— dollars in full satisfaction of such share and interest; and whereas it has been agreed that the share and interest of the said retiring partner in the said freehold and leasehold premises should be conveyed and assigned to the said continuing partners in manner hereinafter mentioned: Now this indenture witnesseth, that in pursuance of such agreement, and in consideration of the sum of —— dollars to the said retiring partner paid by the said continuing partners out of moneys belonging to their said new partnership, he, the said retiring partner, doth hereby grant, assign, and release unto the said continuing part-

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ners, their heirs, executors, administrators, and assigns, respectively, according to the nature of the said respective premises, all those —— equal undivided —— parts or shares, and all other, the parts, shares, or interests of the said retiring partner in the freehold and leasehold buildings, lands, and premises hereinbefore specified, and in all the fixed machinery and other erections and fixtures in or upon the said respective premises: To have and to hold to them, the said continuing partners, their heirs, executors, administrators, and assigns, respectively, as joint tenants, according to their respective shares, rights, and interests, as between themselves, of and in the property of their said present partnership, but as regards the said leasehold premises for the residue of the said term of —— years, and subject to the payment of the said rent, and the performance and observance of the covenants by the lessee and conditions of the said indenture of lease. In witness, etc.

§ 1167. Charge on partner's profits.

Agreement made this —— day of ——, 19—, between ——, senior partner in the firm of —— & Co., of the first part, and ——, junior partner in said firm, of the second part: Whereas it has become expedient and desirable to increase the capital of said firm, and the said junior partner is not at present prepared to pay his proportion thereof, and the said senior partner has agreed to lend and advance to him his share of the increased capital, being the sum of —— dollars, upon the terms and conditions hereinafter expressed: Now these presents witness, that in consideration of the said sum of —— dollars now advanced and paid by the said senior partner into the —— Bank, at —— aforesaid, to the credit of the capital account of the said copartnership for and on behalf of the said junior partner, as he hereby admits, he, the said junior partner, hereby agrees that the said sum of —— dollars so advanced, together with interest thereon at the rate of —— per cent. per annum, shall be a charge and lien upon his share in the copartnership property and profits. The said junior partner further agrees, that he will pay to the

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said senior partner, or permit him to receive, half-yearly, out of his the said junior partner's share of the net profits of the said business, one full moiety thereof in part satisfaction of the said principal sum so advanced and interest thereon, until the whole debt shall be fully satisfied; and in the event of there being no such profits, the same shall be paid out of his share of and in the said copartnership funds and property on the dissolution of said copartnership.

And it is further mutually agreed that in the event of there being no profits arising from the business at the expiration of —— months from the date hereof, or if the said copartnership shall be sooner dissolved, or if the said borrower shall become bankrupt, or shall compound or attempt to compromise with his creditors, or make any assignment of his interest in said copartnership, or shall suffer any action or other proceeding to be instituted against him affecting the copartnership property or his interest therein, then and in either of such cases the whole of the sum so advanced as aforesaid, or so much thereof as shall then remain due, with interest thereon, shall thereupon become payable to the said senior partner, his executors, administrators, or assigns, in priority to any other charge or claim whatsoever thereon or thereto. In witness, etc.

§ 1168. Bond indemnifying retiring partner against partnership debts.

Know all men by these presents, etc.: Whereas the said ——, —— and —— have carried on the business of ——, under the firm of ——, at —— aforesaid, from the —— day of ——; and whereas by an indenture of this same date it has been agreed that the said partnership shall be considered as determined and dissolved from the —— day of ——, and by the same indenture the said —— has assigned and released unto the said —— and ——, their executors, administrators and assigns all the estate and interest of said ——, in the said partnership business, and the moneys, debts, property and effects belonging or due to the said ——, —— and ——, as partners, or in respect of the said

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partnership; and whereas it was part of the arrangement for the dissolution of the said partnership that the said —— and —— should execute and give to the said —— the above-written bond with such condition for making void the same as hereinafter contained:

Now the condition of the above-written bond is such that, if the said —— and ——, or one of them, or their heirs, executors or administrators, shall pay all the bills and notes, and all other debts and moneys due or growing due from the said partnership, or any or either partner in respect of the said partnership, and discharge all the liabilities and perform all the engagements of the said partnership to which the said ——, —— and ——, or their respective heirs, executors or administrators, or any of them, are, is, or shall be liable, and shall keep indemnified the said ——, his heirs, executors, administrators, estate and effects against all actions, proceedings, losses, damages, costs and expenses for or by reason of the nonpayment, nondischarge or nonperformance of any of the said bills, notes, debts, moneys, liabilities or engagements, or of any act or thing in any wise relating thereto, then the above-written bond shall be void, otherwise the same shall remain in full force and effect.

§ 1169. Bond by surviving partners to secure payment of share of deceased partner and for indemnity.

Know all men by these presents that we, —— and —— (surviving partners) of, etc., hereby bind ourselves jointly and severally to —— (executor of deceased partner) for the payment to him the sum of —— dollars:

Whereas the said —— and —— (surviving partners) and —— (deceased partner), late of ——, carried on business in partnership under the style of ——, and under articles of partnership dated ——;

And whereas the said —— died on the —— day of ——, during the subsistence of said partnership, and by his will appointed —— his executor, who duly proved said will in the probate court of —— county on the —— day of ——;

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And whereas the share and interest of —— (deceased partner) in said partnership has been ascertained and agreed to be the sum of —— dollars;

And whereas it has been agreed by the parties hereto that the said sum shall be paid by instalments in the manner hereinafter mentioned, and that the said —— and —— should execute the above-written obligation conditioned as hereinafter expressed;

Now the above-written obligation is conditioned to be void in case the said —— and —— (surviving partners), or either of them or either of their heirs, executors or administrators shall pay on the —— day of —— in each and every year to said executor or to the legal representatives for the time being of said —— (deceased partner), the sum of —— dollars until the whole sum shall be fully paid.

And also shall at all times save harmless and keep fully and effectually indemnified the heirs and legal personal representatives of the said —— (deceased partner), his estate and property, from all debts, liabilities, claims and demands which now or may at any time hereafter be or become due or be made by any person or persons from or against the said heirs or legal personal representatives of the said —— (deceased partner), his estate or effects by reason of the said —— (deceased partner) having been a member of the said partnership.

Signed, sealed, etc., by —— and —— (surviving partners).

§ 1170. Partnership bond with sureties to secure banking account.

(a) Know all men by these presents that we, —— and ——, merchants and copartners under the firm of —— & Co., as principals, and —— and ——, as sureties, are bound to —— and ——, bankers and copartners under the firm of —— & Co., etc.:

Whereas the above-bounden (merchants) are carrying on business at ——, and the above-named (bankers) have agreed to open an account with them, and to accept bills and drafts to be drawn by them upon the said bankers, or the survivors or survivor of them, or any other person or persons who, either in

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partnership with them or any of them, or otherwise, shall for the time being constitute the said banking firm, for any sums not exceeding in the whole, on the balance of account, the sum of —— dollars, provided the said merchants, together with the above-bounden sureties, enter into a bond in the penal sum of —— dollars, with such condition as is hereunder written:

Now the condition of the above-written bond is such that if the said (obligors) or any of them, or any of their heirs, executors or administrators, shall at all times hereafter upon demand pay unto the said bankers, or the survivors or survivor of them, or such other person or persons as aforesaid, all such sums of money as shall be advanced by them or him, to or on account of the said merchants, upon such bills or drafts as aforesaid, and also all interest, commission and customary charges, and shall at all times hereafter keep indemnified the said bankers and every of them, their and every of their heirs, executors and administrators, and also such other person or persons as aforesaid, his and their heirs, executors and administrators, against all losses, damages, costs and expenses which they, or any of them, shall pay, sustain or be put to, for or in respect of such bill or drafts as aforesaid, such sums of money, interest, commission and charges, and such losses, damages, costs and expenses, not exceeding in the whole the sum of —— dollars, then the above-written bond shall be void; otherwise the same shall remain in full force.

In witness, etc.

To prevent the release of the sureties by giving time to the principal debtors, the following clause may be added:

(b) Provided that as between the said (sureties) and the said (obligees) respectively, the said (sureties) shall be considered as principal debtors for the moneys intended to be hereby secured, to the intent that they and each of them, their heirs, executors and administrators, shall not be released or exonerated in respect of their liability hereunder by time being given to the said (principals), or either of them, their heirs, executors or administrators, or by any act or omission of the said (obligees), or the survivor

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or survivors or such other person or persons as aforesaid, or by any other matter or thing whatsoever, whereby the said (sureties) and each of them, their heirs, executors or administrators, as sureties only for the said (principals) would but for this present provision be so released or exonerated.

§ 1171. Bond by partner to copartner and inventor for protection of secret process.

Know all men by these presents that I, ——, partner in the firm of —— and ——, do hereby bind myself to ——, copartner, for the payment to him of the sum of —— dollars as liquidated damages and not as a penalty.

Sealed with my seal this —— day of ——.

Whereas by indenture dated the —— day of ——, made between the said parties, they have agreed to enter into partnership for the term of —— years;

And whereas the said —— has invented a secret process of manufacture, namely, ——;

And whereas upon the execution of said articles of partnership, it was agreed that the above-written bond should be given for the preservation of said secret process;

Now this obligation is conditioned to be void in case the said —— shall at all times hereafter, during the continuance of said partnership, and afterward, well and truly keep and preserve said secret and shall not disclose the same or suffer the same to be disclosed to any other person except with the consent in writing of the said —— (inventor).

(Signature and seal of partners.)

§ 1172. Composition agreement between partners and partnership creditors, with covenant not to sue.

Indenture made the —— day of ——, between ——, —— and ——, all of ——, trading in partnership under the style or firm of —— & Co., and hereinafter called the debtors, of the one part; and the several persons, companies and partnership firms, being creditors of the debtors in respect of their said partnership, whose names and seals are set and affixed in the schedule hereto,

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and who are hereinafter called the said creditors, of the other part:

Whereas, at a meeting of the said creditors held on the ——, day of —— last, a resolution was passed to the effect that they should accept a composition of —— cents on the dollar upon the amount and in full discharge of their said debts, such composition to be payable in three equal instalments at the respective periods of ——, —— and —— calendar months from the —— day of ——; and whereas, in part pursuance of the said resolution, the debtors have delivered to the said creditors respectively, upon their respective execution hereof, the joint promissory notes of the debtors for the payment of the said composition to the said creditors respectively, as aforesaid. Now this indenture witnesseth, that further pursuant to said resolution, and in consideration of the premises the said creditors hereby respectively covenant with the debtors that said creditors, respectively, will not, unless default shall be made in meeting any of the said notes at maturity, sue, arrest, attach or molest any of said debtors, or any of their estate, for or on account of the said respective debts, and that these presents may be pleaded as a defense to any action or other proceeding which may be brought, instituted or taken by or on behalf of any of the said creditors in breach of this covenant; and further, that if the said notes shall be paid at maturity, the said debtors shall be absolutely released and discharged from the said debts due from them to the said creditors respectively, and these presents may accordingly thereafter be pleaded as a defense to any action or other proceeding which said creditors respectively shall have theretofore brought, or otherwise might thereafter bring, institute or take in breach of this covenant. Provided always, that in case default shall be made in meeting any of the said notes at maturity, or in case, before the said notes shall be fully paid to the said creditors respectively as aforesaid, they shall present a bankruptcy petition, or make an assignment of their estate for the benefit of their creditors, or any arrangement with their creditors different from this present arrangement, then and in any of such cases the covenants

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on the part of the said creditors herein contained shall be thenceforth at an end and void, and the said creditors shall respectively thenceforth be at liberty to sue for or prove for the full amount of their respective debts less the amount which may have been received by them on account thereof under these presents or otherwise. Provided further, that these presents shall not in any wise prejudice or affect the rights or remedies of any of the said creditors against any surety or sureties, or any person or persons, other than the said debtors or their respective heirs, executors or administrators, and that for the sake of conformity alone the said debtors or any of them, their or any of their heirs, executors or administrators may be joined in any actions or other proceedings to be brought, instituted or taken by any of the said creditors against such surety or sureties, or other person or persons, and that these presents shall not prejudice or affect any security which any of the said creditors may have or claim for his debt; but nevertheless, if such security be of such a nature that the creditor holding or claiming the same would, by the law of bankruptcy or insolvency in force at the time and place of the execution of these presents, be bound to realize the same, or deduct the value thereof before proving his debt in bankruptcy against the joint estate of the debtors, then and in that case such creditor, unless he shall give up his said security, shall be entitled to receive the said composition upon so much only of his said secured debt as may remain after such security shall have been realized, or after credit shall have been given for the full value thereof.

In witness, etc.

§ 1173. Assignment by partners for benefit of creditors, with preferences.

This indenture, made this —— day of ——, 19—, between —— and ——, partners under the firm name and style of —— of ——, of the first part, and —— of ——, of the second part, witnesseth:

Whereas this partnership is justly indebted in large sums of money, and has become unable to pay and discharge the same with

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punctuality or in full, and said first parties are desirous of making a fair distribution of all their property and effects among their creditors, now therefore, the said first parties, in consideration of the premises, and the sum of one dollar, the receipt whereof is hereby acknowledged, do hereby grant, bargain and sell, release, assign, transfer and set over unto the second party, and to his heirs and assigns forever, all and singular, the land, tenements, hereditaments and all the goods, chattels, merchandise, bills, bonds, notes, book accounts, claims, demands, choses in action, judgments, evidences of debt, and property of every name and nature whatsoever of the said first parties, to have and to hold the same and every part thereof, to the said second party, his heirs, executors, administrators and assigns, in trust to and for the following uses, intents and purposes: Said second party shall take possession of all property hereby assigned, and sell and dispose of the same for the best price that he shall be able to obtain, and convert the same into money, and shall collect all said debts, bonds, notes, accounts, claims, demands and choses in action, as may prove collectible, and thereupon execute, acknowledge and deliver all necessary conveyances and instruments for the purposes aforesaid; and by and with the proceeds of such sales and collections, the second party shall, first, pay all the lawful expenses, costs, charges and commissions of executing and carrying into effect this assignment; Second, pay all wages due to the employes of the parties of the first part; Third, pay and discharge in full the debt due to the firm of —— of ——, for the sum of —— dollars; Fourth, pay and discharge the several and respective debts, bills, notes, or sums of money due or to become due from the first parties, together with such interest as may accrue thereon; and if such net proceeds shall not be sufficient to pay the same in full, then such net proceeds shall be distributed pro rata among said persons, according to the amount of their respective claims; Fifth, if there shall be any residue and remainder after the provisions of the above clauses have been carried out, the second party shall pay and discharge all private and individual debts of the first parties due or to become due, in proportion to the

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amount of money each of said partners has invested in said company; and, if insufficient, then the same shall be applied pro rata to the payment of said debt.

For the better execution hereof, and of the several trusts hereby reposed, the said first parties do hereby make, nominate and appoint the said second party their true and lawful attorney with full power and authority to do, transact and perform all acts, deeds, matters and things which can or may be necessary in the premises, as fully and completely as the said first parties, or either of them, might or could do were these presents not executed; and attorneys, one or more, under him, to make, nominate and appoint, with full power of substitution and revocation, hereby ratifying and confirming all that said attorney, or his attorneys, shall do or cause to be done in the premises.

The party of the second part hereby accepts the trust created by these presents, and covenants that he will faithfully perform the same.

In witness whereof, etc.

§ 1174. Assignment of leasehold by one partner to another on dissolution of partnership—After recitals of partners and of lease and of dissolution of partnership.

Whereas it was by the articles of partnership between said parties declared and agreed that at the expiration or sooner determination of the said partnership, the said —— (continuing partner) should purchase the share and interest of the said —— (retiring partner) in the leasehold premises where the said business might then be carried on, at a price to be determined by valuation;

And whereas said price has been determined to be the sum of —— dollars.

Now in consideration of —— dollars paid by the said —— (continuing partner) to the said —— (retiring partner), the said —— (retiring partner) hereby assigns unto the said —— (continuing partner) all the undivided moiety or share of the said —— (retiring partner) under the said articles of partnership or

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otherwise, of and in the premises comprised in said lease. To hold the same to the said —— (continuing partner) for the unexpired residue of the said term of —— years created by the lease, subject to the rent reserved by and the covenants, conditions and stipulations contained in the lease, and henceforth on the lessee's part to be paid, performed and observed. And the said —— (continuing partner) covenants with said —— (retiring partner) henceforth during the continuance of said lease to pay the rent and observe the covenants, conditions and stipulations therein contained, and to keep indemnified the said retiring partner against all actions, claims and demands whatsoever in said lease.

In witness, etc.

§ 1175. Habendum clause in deed, to hold as partnership property.

To have and to hold, etc., unto the said —— and ——, their heirs and assigns, jointly and as partners, as part of their copartnership estate, so that after the death of either of them the said partners, the survivor of them, or the heirs, executors or administrators of such survivor, shall have full power, without the concurrence of the executors or administrators of the one of them so first dying, to sell, mortgage, lease or otherwise dispose of the premises, or any part thereof, and to receive and give effectual discharges for any moneys arising from any such disposition, and that every such disposition or receipt shall be absolutely binding upon all persons having or claiming any interest in the partnership estate.

§ 1176. Mortgage of partner's interest.

Indenture made the —— day of ——, 19—, between —— of ——, of the one part, the mortgagor; and —— of ——, of the other part, the mortgagee: Whereas the said mortgagor is a partner in the firm of ——, carrying on the business of ——, at ——, in the county of ——, under articles of partnership dated the —— day of ——, 19—; and whereas the said mortgagee has agreed to lend to the said mortgagor the sum of ——

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dollars upon having the repayment of the same by monthly instalments, with interest for the same, or for so much thereof as shall for the time being remain unpaid, secured in manner hereinafter appearing:

Now this indenture witnesseth, that in pursuance of the said agreement, and in consideration of the sum of —— dollars now paid to the said mortgagor by the said mortgagee (the receipt whereof the said mortgagor hereby acknowledges), the said mortgagor hereby covenants with the said mortgagee to pay to him the sum of —— dollars within the period of —— calendar months from the date hereof, by equal monthly instalments, the first of such payments to be made on the —— day of —— next, and the last of such payments to be made on the —— day of ——, 19—. The said mortgagor hereby charges all that his share and interest in the said business, and in the good will thereof, and in the capital, book debts and assets thereof, with the repayment to the said mortgagee, his executors, administrators or assigns, of the moneys hereby secured at the times and in manner aforesaid; and the said mortgagor hereby covenants with the said mortgagee that he, the said mortgagor, will, so long as he shall continue a partner in the said firm and during the continuance of this security, duly observe and perform all the covenants, conditions and stipulations contained in the said articles, and on his part to be observed and performed; and that he will not do or suffer anything whereby the said partnership may be determined, or the said share or interest, or any of the premises hereby charged, may be encumbered or alienated, save in the ordinary course of business, or otherwise prejudicial in any way whatsoever; and that he will at all times devote his time and attention to the said business, and diligently and faithfully employ himself therein, and use his utmost endeavor to carry on the same to advantage; and will from time to time inform and keep informed the said mortgagee, his executors, administrators and assigns, if and whenever requested so to do, of the state and condition of the affairs of the said business, and of the liabilities, assets, profits and losses thereof; and the said mortgagor hereby irrev-

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ocably appoints the said mortgagee, his executors, administrators and assigns to be his lawful attorney and attorneys, in the name and on behalf of the said mortgagor, to give notice of dissolution of the said partnership, and to demand and take all accounts pursuant to the said articles of partnership, and to demand, sue for, recover, receive and give valid receipts for all moneys, effects and things to which the said mortgagor is entitled under the said articles of partnership, or otherwise in relation to the premises, and for the purposes aforesaid or any of them to execute and do all such instruments and things as may be deemed necessary or expedient: Provided always, that if the said mortgagor shall die, or if he or the said firm shall become bankrupt, or enter into any composition or scheme for the arrangement or liquidation, statutory or otherwise, of his or their affairs, for the benefit of his or their creditors generally, or if he shall fail to observe and perform any of the covenants herein contained and on his part to be observed and performed, and particularly if he shall at any time during the continuance of this security absent himself from the said business at any time for more than —— days' except in case of illness, without the consent of the said mortgagee, his executors, administrators and assigns, then and in any such case the whole of the said sum of —— dollars (principal and interest) shall immediately become due and payable.

In witness, etc.

§ 1177. Option to one partner to buy partnership property.

This agreement, made this —— day of ——, between —— of ——, first party, and —— of ——, second party, witnesseth:

Whereas, a partnership was formed on the —— day of ——, 19—, between said parties, which is about to be dissolved;

And, whereas, they have been unable to reach an agreement as to the terms of dissolution;

Now, therefore, in consideration of the premises, said second party hereby agrees to sell all his interest in said partnership and its effects to said first party, and not to sell the same to any one else.

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It is expressly understood and agreed that a period of —— weeks from date shall be allowed for said parties to reach an agreement as to the terms of dissolution. If, at the expiration thereof, no agreement shall have been reached, said first party shall select an arbitrator, said second party shall select another arbitrator, and said arbitrators so chosen shall select a third; and said arbitrators shall agree upon the terms of dissolution and sale, and thereupon said second party shall convey all his interest in said partnership and its effects to said first party, in accordance with this agreement and the decision of said arbitrators.

In witness, etc.

§ 1178. Appointment of an arbitrator in pursuance of arbitration clause in articles of partnership.

Whereas by articles of partnership, dated ——, 19—, amongst other things it was agreed that, in case any dispute or question should arise between the said parties relative to the construction of the said articles, or to any of the matters therein contained, the same should be referred to the arbitration of two indifferent persons, one to be named by each of the parties, with power for such arbitrators to appoint an umpire in case of their disagreement; and that the award of the said arbitrators or umpire should be final and conclusive; and whereas disputes have arisen between the said parties relating to their partnership affairs, and they have in pursuance of the said covenant agreed to refer the same accordingly: Now, therefore, I, ——, one of the partners, hereby nominate and appoint —— of —— an arbitrator for me and on my behalf, to hear and determine the disputes aforesaid, in accordance with the provisions of the said articles of partnership.

Dated the —— day of ——, 19—.

§ 1179. Award on reference to settle terms of dissolution of partnership.

I do make this my award of and concerning the matters so referred to me as aforesaid, as follows:

I do award, order, and adjudge that the said partnership shall

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be deemed and taken to have ended and been determined on and from the —— day of ——, 19—.

I do award, order, and direct that the said first party, his executors or administrators, shall and may have, demand, and receive to his, her, or their own use, without interference of the said second party, all debts due and owing to the said partnership from any person whomsoever; and shall and may use the name of the said second party either alone or jointly, in any action or suit to be commenced for the recovery of any such debt or demand.

I do award, order, and direct that the said first party, his executors or administrators, shall and do bear, pay and discharge all debts, demands, damages and claims whatsoever, due or owing by the said partnership, or which any person hath or can make against the said partnership, or the said second party in respect thereof; and shall and do indemnify and keep harmless the said second party from and against all such debts, demands, damages and claims; and from and against any loss and damages that may be incurred or sustained by the said second party by reason of his name being used in any such action or suit so to be commenced as aforesaid, in pursuance of the authority hereby given to the said first party, his executors and administrators; and that the said first party shall seal, execute, and deliver his bond to the said second party, in the penal sum of —— dollars, conditioned to indemnify and keep harmless the said second party from and against the above-mentioned debts, demands, damages, claims, and loss.

I do award, order, and direct that the said second party shall, at any time, upon the request of the said first party, his executors or administrators, deliver up to the said first party, his executors or administrators, all and every, the books, papers and writings which may be in the custody, power or possession of him, the said second party, in any wise relating to or concerning the said business of the said copartnership.

And I further award and direct that the said first party shall, from time to time, give to the said second party an account in writing of his proceedings in the ascertainment and recovery of

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the said debts, within —— weeks after a request in writing so to do shall have been served upon the said first party, on the part of the said second party; and shall also from time to time, as the said debts shall be respectively received, pay to the said second party one —— part thereof, after having first deducted all necessary expenses incurred touching the ascertaining, collecting and recovering the same.

§ 1180. Agreement for joint adventure or syndicate.

Agreement made on —— day of ——, ——, between ——, ——, ——, and ——.

It is hereby agreed by the aforesaid parties that they have formed a syndicate under the firm name of —— syndicate, for the purpose of —— (for instance, purchasing at receiver's sale and selling again the property of the —— company).

—— shall manage the syndicate and in his own name shall make all contracts for the sale and purchase of said property, but all such contracts shall be for the sole benefit of the syndicate, and he shall be indemnified by the parties to this agreement for any and all necessary expenses or losses reasonably incurred in advancing the purposes of this agreement.

Each of the parties to this agreement shall pay into —— Bank, to the credit of the syndicate, —— dollars, and each shall share equally in profits and losses of the venture.

The manager of the syndicate shall have power to call a meeting of the parties by notice sent through the mails, and shall call such meeting before consummation of any contract for the purchase or sale of the aforesaid property, unless authorized to make such contract at a previous meeting.

A majority of the members may at any meeting remove the manager.

The manager shall be entitled to be repaid his reasonable expenses, and shall receive a commission of —— per cent. of the net profits made by the syndicate, and his commission shall be paid prior to the division of profits between the members of this syndicate.

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If there shall be more than one manager, the said commission shall be divided between them in proportion to the services performed by each according to the judgment of the members of the syndicate.

This syndicate shall be dissolved when the said —— has been purchased and resold, or if the said purchase has not been consummated within —— months from the date of this agreement.

Upon dissolution, after payment of expenses and commissions, the net profits from said venture and the residue of the capital shall be equally distributed among the members.

In witness, etc.

(This agreement presupposes an equal investment of capital, but can easily be varied where investments of capital are unequal, and if desired, provision can be made for each member to have a voting power in proportion to the capital contributed.)

§ 1181. Preliminary agreement between partners as to formation of corporation.

Agreement entered into this —— day of ——, between A B, C D and E F, partners now doing business under the firm name of B D and Co.

Witnesseth, that the aforesaid parties are desirous of incorporating their said partnership business, and hereby agree to do so upon the terms and conditions following.

The name of the corporation shall be the B-D Co. (thus retaining as nearly as possible the old firm name).

The purpose of the corporation shall be the manufacture and sale of agricultural implements.

The capital stock shall consist of $30,000 common stock, and $20,000 preferred stock, bearing interest at the rate of five per cent. per annum. Of this stock, $10,000 of common stock shall be transferred by the corporation to A B in return for his interest in the partnership business, $10,000 of common stock, and $10,000 of preferred stock shall be transferred to C D in return for his interest in the partnership business, and $10,000 of com-

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mon stock and $10,000 of preferred stock to E F in return for his interest in the partnership business.

The directors of the corporation shall be A B, C D, and E F.

A B shall be president of the corporation, C D shall be secretary and treasurer, and E F shall be the general manager of its business, and each shall receive a salary of $2,000 per year.

The policy of the corporation shall be determined by the directors, and the powers of each officer shall be those exercised by similar officers in similar corporations.

It is agreed by each party that he will fully transfer his interest in the partnership business now carried on by the parties, to the corporation after its organization, in return for its capital stock to be issued to him in the amounts heretofore provided, and it is agreed on behalf of the corporation that such stock will be issued in the amounts heretofore provided in return for the transfer by each partner of his interest in the partnership business to the corporation.

§ 1182. Promoter's agreement with partners to form corporation.

(a) This agreement by and between A B and C D, parties of the first part, and G H, party of the second part,

Witnesseth, that, whereas the said parties of the first part now own and operate, and have owned and operated as partners for —— years last past, a certain manufacturing plant located at ——, and have during all of said time been engaged in the manufacture of (here state nature of business); and, whereas said first parties, as such partners, desire to change said partnership into a corporation, and continue the business as a corporation with a capital stock of $——, and to transfer to said corporation the said manufacturing plant, and all property and assets and the good will of said partnership, as a part of the capital stock of the proposed corporation; and,

Whereas, the said party of the second part proposes to undertake to secure subscriptions from outside persons to the capital stock of the proposed corporation:

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Now, therefore, it is mutually agreed that in consideration of the premises the said parties of the first part hereby agree and bind themselves to convey, transfer and assign to the said corporation when organized, all the property, assets and good will of the said partnership, at the fixed price and value of $——, and to take and subscribe of the capital stock of said proposed corporation an amount equal in its face value to the said value of the said manufacturing plant and good will.

In consideration of the premises and the payment to be made as hereafter provided, the said party of the second part undertakes and agrees to secure bona-fide and solvent subscriptions to the capital stock of said proposed corporation, to the extent of the residue thereof. Said subscriptions to be secured on or before the —— day of —— and payable as follows: (here state terms of subscription).

In consideration of the premises and of the services to be performed by said G H, it is hereby mutually agreed and understood he shall have and receive in payment of his said services —— shares of the capital stock of said corporation, to be issued to him on its complete organization; and the acceptance of the benefits of this agreement, and the acceptance of a conveyance of the said above described property by the proposed corporation when its organization is complete, shall be taken and regarded as sufficient to compel it to perform the conditions of this agreement, and to issue to said G H the said shares of stock as herein provided.

In witness whereof, etc.

(Signed.)

(b) This agreement by and between A B, of the first part, known as the promoter, and C D, E F and G H, parties of the second part, known as the subscribers,

Witnesseth, that in consideration of the mutual promise and of the benefits to be derived therefrom, it is proposed and agreed to organize a corporation under the laws of the state of ——, to be known and named as (state proposed name), or other name as may hereafter be agreed upon, the purpose of which shall be to

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transact the business of (here state general nature of business), with power to do and perform all things necessary directly or indirectly, to carry on and transact such business pursuant to the statutes of said state; and,

Whereas, it is proposed that said corporation shall have a capital stock of $——, divided into —— number of shares of $—— each (or to be divided into —— shares of preferred stock and —— shares of common stock of the par value of $—— each); and the said second parties, the subscribers, desire to become stockholders in said corporation:

Now, therefore, we, the said subscribers, in consideration of our mutual promises and of the benefits to be derived from the organization of said corporation do severally agree with each other and with the said A B, who has been and is actively interested in the formation of said corporation, to take and pay for the number (and kind) of shares of stock in said proposed corporation set opposite our respective names, and to pay thereafter the sum of $—— per share; payments to be made as follows (here state terms of payment).

It is further agreed that in consideration of the premises and on full payment of said subscriptions that each of said subscribers, or his assigns, shall on the organization of said corporation, receive certificates of stock therein to the amount of his subscription and that each subscriber hereto on full payment of his said subscription shall be a member and stockholder in said corporation to the amount and extent of his said shares so subscribed and paid.

This agreement is on the express condition that the said A B shall procure on or before the —— day of —— sufficient solvent and bona-fide subscriptions, which together with the subscriptions hereto made by the said subscribers shall amount to $——, the full proposed (or some stated part) of the capital stock of said proposed corporation.

In consideration of said subscriptions and of the promise of the said subscribers, the said A B hereby agrees and binds himself to continue the active operation of promoting and organizing

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said corporation and to procure on or before the date aforesaid bona fide and solvent subscriptions to the capital stock of said proposed corporation in said amount, and to perfect the organization of said corporation immediately thereafter.

And in consideration of the premises the said subscribers agree and bind themselves, upon full compliance by the said A B, to sign, execute and make any petition, application or certificate or other writing, and to do all things and to take all necessary steps required by subscribers in completing the said proposed organization.

In consideration of the premises and of the services so to be performed of said A B, it is mutually agreed and understood that the said A B shall have and receive for and in payment of such services —— shares of the capital stock of said corporation, to be issued to him on its organization, or on failure of the said corporation when organized so to do, we, the subscribers, each agree and bind ourselves to assign and transfer to said A B of the shares so issued to us, the said number of shares in proportion to the number owned by each of us.

In testimony whereof, etc.

Name	Residence.	Number of Shares.	Kind of Shares.
——	——	——	——
——	——	——	——
——	——	——	——

§ 1183. Limited partnership.

It is not deemed advisable to give many general forms for limited partnerships inasmuch as such partnerships are generally provided for by statute, in which the essentials are provided for, and which must be strictly followed, as is shown in the chapter on "Limited Partnerships."

§ 1184. Certificate of formation.

State of ——, County of ——, ss.

The undersigned ——, —— and —— hereby form a limited

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partnership pursuant to the statutes of the state of ——, and for that purpose hereby certify:

That the name of said limited partnership shall be ——, under which said partnership shall be conducted.

That the names, both Christian and surname, and respective places of residence of all the partners herein and hereto are as follows:

Christian Name.	Surname.	Residence.
——	——	——
——	——	——
——	——	——

That the aforesaid —— and —— are general partners and the aforesaid —— is special partner, respectively, herein.

That the following amounts of capital have been contributed by the aforesaid parties and partners, respectively: by ——, the sum of —— dollars ($——), by ——, the sum of —— dollars ($——) and by ——, the sum of —— dollars ($——), and that each of said sums has been contributed to the common stock of the said partnership.

The general nature of the business to be transacted by such partnership is —— (here state).

The partnership aforesaid is to commence on ——, 19—, and the same is to terminate on ——, 19—.

(Signatures and acknowledgment as in deeds, etc.)

Limited partnerships are commonly provided for by statute in the various states. The certificate of formation must be drafted to meet the statutory requirements. The above form will answer for a general outline.

Bankruptcy

§ 1185. Proof of claim in bankruptcy by partnership—(Official form).

United States of America, ——, District of ——,
State of ——, County of ——, ss.

At ——, in said ——, district of ——, on the —— day of —— A D. 19—, came ——, of ——, in the county of ——, and state of ——, and made oath —— (or, affirmation) and says:

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That he is one of the firm of ——, consisting of himself and ——, of ——, in the county of —— and state of ——;

That ——, the person —— (by or against) whom a petition for adjudication of bankruptcy has been filed, was at and before the filing of said petition, and still is justly and truly indebted to this deponent's said firm in the sum of —— dollars, with interest from ——, 19—, at —— per cent. per annum; that the consideration of said debt is as follows: ——; that no part of said debt has been paid (except) ——; that there are no set-offs or counterclaims to the same (except) ——.

That said claim consists of an open account —— due on —— (if different dates give average due date, see Order XXI), 19—; that no note has been received for such account, nor has any judgment been rendered thereon.

That the only securities held by this deponent's said firm for said debt are the following: ——.

That this deponent has not, nor his said firm nor any person by —— order or to the knowledge or belief of said deponent, for —— use had or received any manner of security for said debt whatever.

And this deponent further says, that this deposition can not be made by the claimant in person because —— and that he is duly authorized by his principal to make this affidavit, and that it is within his knowledge that the aforesaid debt was incurred as and for the consideration above stated, and that such debt, to the best of his knowledge and belief, still remains unpaid and unsatisfied.

——.

Subscribed and sworn to before me this —— day of —— A. D. 19—.

——,

(Seal.)

——.

(Official character.)

§ 1186. Partnership petition—(Official form).

To the honorable ——, Judge of the District Court of the United States for the —— district of ——:

The petition of —— respectfully represents:

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That your petitioners and —— have been partners under the firm name of ——, having their principal place of business at ——, in the county of ——, and district and state of ——, for the greater portion of the six months next immediately preceding the filing of this petition; that the said partners owe debts which they are unable to pay in full; that your petitioners are willing to surrender all their property for the benefit of their creditors, except such as is exempt by law, and desire to obtain the benefit of the acts of congress relating to bankruptcy.

That the schedule hereto annexed, marked A, and verified by —— oath, —— (or, affirmation) contains a full and true statement of all the debts of said partners, and, as far as possible, the names and places of residence of their creditors, and such further statements concerning said debts as are required by the provisions of said acts.

That the schedule hereto annexed, marked B, and verified by —— oath, —— (or, affirmation) contains an accurate inventory of all the property, real and personal, of said partners, and such further statements concerning said property as are required by the provisions of said acts.

And said —— further states that the schedule hereto annexed, marked C, and verified by his oath, —— (or, affirmation) contains a full and true statement of all his individual debts, and, as far as possible, the names and places of residence of his creditors, and such further statements concerning said debts as are required by the provisions of said acts; and that the schedule hereto annexed, marked D, and verified by his oath, —— (or affirmation) contains an accurate inventory of all his individual property, real and personal, and such further statements concerning said property as are required by the provisions of said acts.

And said —— further states that the schedule hereto annexed, marked E, and verified by his oath, —— (or affirmation) contains a full and true statement of all his individual debts, and, as far as possible, the names and places of residence

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of his creditors, and such further statements concerning said debts as are required by the provisions of said acts; and that the schedule hereto annexed, marked F, and verified by his oath, —— (or affirmation) contains an accurate inventory of all his individual property, real and personal, and such further statements concerning said property as are required by the provisions of said acts.

And said —— further states that the schedule hereto annexed, marked G, and verified by his oath, —— (or affirmation) contains a full and true statement of all his individual debts, and, as far as possible, the names and places of residence of his creditors, and such further statements concerning said debts as are required by the provisions of said acts; and that the schedule hereto annexed, marked H, and verified by his oath, —— (or affirmation) contains an accurate inventory of all his individual property, real and personal, and such further statements concerning said property as are required by the provisions of said acts.

And said —— further states that the schedule hereto annexed, marked J, and verified by his oath, —— (or affirmation) contains a full and true statement of all his individual debts, and, as far as possible, the names and places of residence of his creditors, and such further statements concerning said debts as are required by the provisions of said acts; and that the schedule hereto annexed, marked K, and verified by his oath, —— (or affirmation) contains an accurate inventory of all his individual property, real and personal, and such further statements concerning said property as are required by the provisions of said acts.[1]

Wherefore your petitioners pray that the said firm may be

[1] There are two schedules, "A," and "B," to be filed with petitions for voluntary bankruptcy. In the case of partners these schedules have to be filed for the partnership and for each of the petitioning members. These schedules in the form for partnership petition, prepared by the Supreme Court, are marked serially, A, B, C, D, E, etc., corresponding to said schedules A and B, which schedules should be used and the lettering changed accordingly.

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adjudged by a decree of the court to be bankrupts within the purview of said acts.

————,
————,
————,
Petitioners.

————,
Attorney for petitioners.

United States of America, —— District of ——,
State of ——, County of ——, ss:
——, the petitioning debtors mentioned and described in the foregoing petition, do hereby make solemn —— that the statements contained therein are true, according to the best of their knowledge, information, and belief.

————,
————,
————,
Petitioners.

Subscribed and —— to before me, this —— day of ——, A .D. 19—.
(Seal.)
————,
————.
(Official character.)

A form to be used where one of the partners fails to join in the bankruptcy proceedings may be made by inserting a clause that "said ——, a partner in said partnership, whose place of residence is in ——, in the district of ——, refuses to join in this petition, that he is not a wage-earner, and is not a person engaged chiefly in farming or tilling the soil; that he owes debts which he is unable to pay in full," and by adding a prayer for service of the petition with a subpœna against the nonconsenting partner.

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Pleadings Generally

§ 1187. Caption.

No. ——.

(a) X, Y and Z, plaintiff, v. A, B and Co., defendant.

In the court of ——, —— county, ——. Petition (or complaint) (or answer) (or reply).

OR

No. ——.

(b) X, Y and Z, partners doing business as Z and Company, plaintiffs, v. A and B, partners doing business as A and B, defendants.

In the court of ——, —— county, ——. Petition (etc.).

OR

No. ——.

(c) A and B, partners doing business as B and Co., and B and Co., plaintiffs, v. X and Z, partners doing business as X and Co., and X and Co., defendants.

In the court of ——, —— county, ——. Petition (etc.).

§ 1188. Petition for accounting.

(State preliminary allegations as in petition for dissolution, and add thereto.)

On the —— day of ——, it was agreed between plaintiff and defendant that said partnership be dissolved, and that defendant should have charge of the closing of said business of said firm, and of collecting the assets and paying the liabilities of said firm, and of distributing the balance thereafter between said partners in proportion to their respective interests in said partnership.

Defendant proceeded to settle the affairs of said partnership, and has collected a large amount of money for said firm, but has neglected and refused to pay the debts of said firm therewith, or to account therefor to plaintiff, although repeatedly requested to do so by said plaintiff, and defendant has converted the said money so collected to his own use.

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Plaintiff therefore asks that said defendant may be compelled to account to plaintiff therefor, and ordered to pay to plaintiff any balance found due him (or, if desired, a receiver may also be asked to settle up the debts, etc., of said partnership).

§ 1189. Petition for dissolution.

Now comes plaintiff, and says that on the —— day of ——, ——, he entered into a written contract of partnership with defendant herein, a copy of which written contract is hereto attached, marked "Exhibit A," by the terms of which written contract it was provided that (here state the clauses of the contract relied upon in this suit).

On the same day the said parties hereto contributed to said partnership the amounts of their several contributions, and opened the business of said partnership, all in accordance with the provisions of said written contract.

On the —— day of ——, ——, said defendant (here state causes for dissolution).

Said firm has assets, composed of stock in trade, real estate. fixtures, and outstanding accounts, in the amount of $——, besides a valuable good will, and has liabilities, consisting of bills and accounts payable, amounting to $——, and it will be for the best interests of said firm that the said assets of said firm be sold, and the proceeds of said sale, after the debts of said partnership be sold, be divided between said partners in proportion to their interests in said firm.

Wherefore, plaintiff prays the said court that the said partnership be adjudged dissolved, and that a receiver be appointed by said court, to close the affairs of said partnership, convert the property of said firm into money, pay all the debts of said firm, and distribute the residue thereof, if any, to the said partners according to their respective rights, and for such other and further relief as is just and proper.

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Pleading Causes for Dissolution

§ 1190. Transfer of one partner's interest.

That said ——, on the —— day of ——, without the consent of plaintiff, assigned all his interest in said partnership to defendant ——, including all his right and title to all of the property of every description of said partnership, by reason of which act of said ——, said partnership became dissolved.

§ 1191. Assignment for benefit of creditors.

Said defendant, on the —— day of ——, while insolvent, assigned, in the Probate Court of —— County, all his property of every kind and description, including his interest in and to said partnership, and in and to all the property of every kind and description of said partnership, to ——, as assignee for the benefit of creditors.

§ 1192. Breach of contract by one partner.

Said defendant ——, on the —— day of ——, violated the provisions of said contract of partnership in this, to wit:—(here state breach), and has ever since, and now does, neglect and refuse to carry out said provisions of said contract, according to the terms thereof.

§ 1193. Dissolution under terms of contract.

The articles of partnership aforesaid provided that either of said partners, upon written notice of at least —— days, should have the right to dissolve said partnership.

Plaintiff says that on the —— day of ——, ——, he, the said plaintiff, desiring to so dissolve said partnership, served defendant, according to said partnership agreement, with said written notice of such desire and intention.

Answer

§ 1194. Admission and general denial.

(a) Defendant admits that (here specifically designate all matters stated in the petition, if any, which are admitted), and

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denies each and every other material allegation in plaintiff's petition contained.

(b) The defendant denies each and every material allegation of plaintiff's complaint.

§ 1195. Specific denial.

Defendant denies that (here state in detail each and every allegation of plaintiff's petition to be controverted by defendant).

Note: Certain facts may be admitted either when coupled with a specific denial or a general denial. (a) The pleader must use his own discretion as to whether he will deny generally or specifically, which must depend upon the circumstances of each individual case.

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APPENDIX

Text of Uniform Partnership Act

PART I

PRELIMINARY PROVISIONS

Section 1. (Name of Act.) This act may be cited as Uniform Partnership Act.

Sec. 2. (Definition of Terms.) In this act, "Court" includes every court and judge having jurisdiction in the case.

"Business" includes every trade, occupation, or profession.

"Person" includes individuals, partnerships, corporations, and other associations.

"Bankrupt" includes bankrupt under the Federal Bankruptcy Act or insolvent under any state insolvent act.

"Conveyance" includes every assignment, lease, mortgage, or encumbrance.

"Real Property" includes land and any interest or estate in land.

Sec. 3. (Interpretation of Knowledge and Notice.) (1) A person has "knowledge" of a fact within the meaning of this act not only when he has actual knowledge thereof, but also when he has knowledge of such other facts as in the circumstances shows bad faith.

(2) A person has "notice" of a fact within the meaning of this act when the person who claims the benefit of the notice

(a) States the fact to such person, or

(b) Delivers through the mail, or by other means of communication, a written statement of the fact to such person or to a proper person at his place of business or residence.

Sec. 4. (Rules of Construction.) (1) The rule that statutes

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in derogation of the common law are to be strictly construed shall have no application to this act.

(2) The law of estoppel shall apply under this act.

(3) The law of agency shall apply under this act.

(4) This act shall be so interpreted and construed as to effect its general purpose to make uniform the law of those states which enact it.

(5) This act shall not be construed so as to impair the obligations of any contract existing when the act goes into effect, nor to affect any action or proceedings begun or right accrued before this act takes effect.

Sec. 5. (Rules for Cases Not Provided for in This Act.) In any case not provided for in this act the rules of law and equity, including the law merchant, shall govern.

PART II

NATURE OF A PARTNERSHIP

Section 6. (Partnership Defined.) (1) A partnership is an association of two or more persons to carry on as co-owners a business for profit.

(2) But any association formed under any other statute of this state, or any statute adopted by authority, other than the authority of this state, is not a partnership under this act, unless such association would have been a partnership in this state prior to the adoption of this act; but this act shall apply to limited partnerships except in so far as the statutes relating to such partnerships are inconsistent herewith.

Sec. 7. (Rules for Determining the Existence of a Partnership.) In determining whether a partnership exists, these rules shall apply:

(1) Except as provided by section 16 persons who are not partners as to each other are not partners as to third persons.

(2) Joint tenancy, tenancy in common, tenancy by the entireties, joint property, common property, or part ownership does

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not of itself establish a partnership, whether such co-owners do or do not share any profits made by the use of the property.

(3) The sharing of gross returns does not of itself establish a partnership, whether or not the persons sharing them have a joint or common right or interest in any property from which the terms are derived.

(4) The receipt by a person of a share of the profits of a business is prima facie evidence that he is a partner in the business, but no such inference shall be drawn if such profits were received in payment:

(a) As a debt by instalments or otherwise,

(b) As wages of an employé or rent to a landlord,

(c) As an annuity to a widow or representative of a deceased partner,

(d) As interest on a loan, though the amount of payment vary with the profits of the business,

(e) As the consideration for the sale of the good will of a business or other property by instalments or otherwise.

Sec. 8. (Partnership Property.) (1) All property originally brought into the partnership stock or subsequently acquired, by purchase or otherwise, on account of the partnership, is partnership property.

(2) Unless the contrary intention appears, property acquired with partnership funds is partnership property.

(3) Any estate in real property may be acquired in the partnership name. Title so acquired can be conveyed only in the partnership name.

(4) A conveyance to a partnership in the partnership name, though without words of inheritance, passes the entire estate of the grantor unless a contrary intent appears.

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PART III

RELATIONS OF PARTNERS TO PERSONS DEALING WITH THE PARTNERSHIP

Section 9. (Partner Agent of Partnership as to Partnership Business.) (1) Every partner is an agent of the partnership for the purpose of its business, and the act of every partner, including the execution of the partnership name of any instrument, for apparently carrying on in the usual way the business of the partnership of which he is a member, binds the partnership, unless the partner so acting has in fact no authority to act for the partnership in the particular matter, and the person with whom he is dealing has knowledge of the fact that he has no such authority.

(2) An act of a partner which is not apparently for the carrying on of the business of the partnership in the usual way does not bind the partnership unless authorized by the other partners.

(3) Unless authorized by the other partners or unless they have abandoned the business, one or more but less than all of the partners have no authority to:

(a) Assign the partnership property in trust for creditors or on the assignee's promise to pay the debts of the partnership,

(b) Dispose of the good will of the business,

(c) Do any other act which would make it impossible to carry on the ordinary business of the partnership,

(d) Confess a judgment,

(e) Submit a partnership claim or liability to arbitration or reference.

(4) No act of a partner in contravention of a restriction on his authority shall bind the partnership to persons having knowledge of the restriction.

Sec. 10. (Conveyance of Real Property of the Partnership.) (1) Where title to real property is in the partnership name, any partner may convey title to such property by a conveyance executed in the partnership name; but the partnership may re-

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cover such property unless the partner's act binds the partnership under the provisions of paragraph (1) of section 9, or unless such property has been conveyed by the grantee or a person claiming through such grantee to a holder for value without knowledge that the partner, in making the conveyance, has exceeded his authority.

(2) Where title to real property is in the name of the partnership, a conveyance executed by a partner, in his own name, passes the equitable interest of the partnership, provided the act is one within the authority of the partner under the provisions of paragraph (1) of section 9.

(3) Where the title to real property is in the name of one or more but not all the partners, and the record does not disclose the right of the partnership, the partner in whose name the title stands may convey title to such property, but the partnership may recover such property if the partner's act does not bind the partnership under the provisions of paragraph (1) of section 9, unless the purchaser or his assignee is a holder for value without knowledge.

(4) Where the title to real property is in the name of one or more or all the partners, or in a third person in trust for the partnership, a conveyance executed by a partner in the partnership name, or in his own name, passes the equitable interest of the partnership, provided the act is one within the authority of the partner under the provisions of paragraph (1) of section 9.

(5) Where the title to real property is in the names of all the partners a conveyance executed by all the partners passes all their rights in such property.

Sec. 11. (Partnership Bound by Admission of Partner.) An admission or representation made by any partner concerning partnership affairs within the scope of his authority as conferred by this act is evidence against the partnership.

Sec. 12. (Partnership Charged with Knowledge or Notice to Partner.) Notice to any partner of any matter relating to partnership affairs, and the knowledge of the partner acting in the particular matter, acquired while a partner or then present to

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his mind, and the knowledge of any other partner who reasonably could and should have communicated it to the acting partner, operate as notice to or knowledge of the partnership, except in the case of a fraud on the partnership committed by or with the consent of that partner.

Sec. 13. (Partnership Bound by Partner's Wrongful Act.) Where, by any wrongful act or omission of any partner acting in the ordinary course of the business of the partnership, or with the authority of his copartners, loss or injury is caused to any person, not being a partner in the partnership, or any penalty is incurred, the partnership is liable therefor to the same extent as the partner so acting or omitting to act.

Sec. 14. (Partnership Bound by Partner's Breach of Trust.) The partnership is bound to make good the loss:

(a) Where one partner acting within the scope of his apparent authority receives money or property of a third person and misapplies it; and

(b) Where the partnership in the course of its business receives money or property of a third person and the money or property so received is misapplied by any partner while it is in the custody of the partnership.

Sec. 15. (Nature of Partner's Liability.) All partners are liable:

(a) Jointly and severally for everything chargeable to the partnership under sections 13 and 14.

(b) Jointly for all other debts and obligations of the partnership; but any partner may enter into a separate obligation to perform a partnership contract.

Sec. 16. (Partner by Estoppel.) (1) When a person, by words spoken or written or by conduct, represents himself, or consents to another representing him to any one, as a partner in an existing partnership or with one or more persons not actual partners, he is liable to any such person to whom such representation has been made, who has, on the faith of such representation, given credit to the actual or apparent partnership, and if he has made such representation or consented to its being

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made in a public manner, he is liable to such person, whether the representation has or has not been made or communicated to such person so giving credit by or with the knowledge of the apparent partner making the representation or consenting to its being made.

(a) When a partnership liability results, he is liable as though he were an actual member of the partnership.

(b) When no partnership liability results, he is liable jointly with the other persons, if any, so consenting to the contract or representation as to incur liability, otherwise separately.

(2) When a person has been thus represented to be a partner in an existing partnership, or with one or more persons not actual partners, he is an agent of the persons consenting to such representation to bind them to the same extent and in the same manner as though he were a partner in fact, with respect to persons who rely upon the representation. Where all the members of the existing partnership consent to the representation, a partnership act or obligation results; but in all other cases it is the joint act or obligation of the person acting and the persons consenting to the representation.

Sec. 17. (Liability of Incoming Partner.) A person admitted as a partner into an existing partnership is liable for all the obligations of the partnership arising before his admission as though he had been a partner when such obligations were incurred, except that this liability shall be satisfied only out of partnership property.

PART IV

RELATIONS OF PARTNERS TO ONE ANOTHER

Section 18. (Rules Determining Rights and Duties of Partners.) The rights and duties of the partners in relation to the partnership shall be determined, subject to any agreement between them, by the following rules:

(a) Each partner shall be repaid his contributions, whether by way of capital or advances to the partnership property, and

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share equally in the profits and surplus remaining after all liabilities, including those to partners, are satisfied; and must contribute toward the losses, whether of capital or otherwise, sustained by the partnership according to his share in the profits.

(b) The partnership must indemnify every partner in respect of payments made and personal liabilities reasonably incurred by him in the ordinary and proper conduct of its business, or for the preservation of its business or property.

(c) A partner who, in aid of the partnership makes any payment or advance beyond the amount of capital which he agreed to contribute, shall be paid interest from the date of the payment or advance.

(d) A partner shall receive interest on the capital contributed by him only from the date when repayment should be made.

(e) All partners have equal rights in the management and conduct of the partnership business.

(f) No partner is entitled to remuneration for acting in the partnership business, except that a surviving partner is entitled to reasonable compensation for his services in winding up the partnership affairs.

(g) No person can become a member of a partnership without the consent of all the partners.

(h) Any difference arising as to ordinary matters connected with the partnership business may be decided by a majority of the partners; but no act in contravention of any agreement between the partners may be done rightfully without the consent of all the partners.

Sec. 19. (Partnership Books.) The partnership books shall be kept, subject to any agreement between the partners, at the principal place of business of the partnership, and every partner shall at all times have access to and may inspect and copy any of them.

Sec. 20. (Duty of Partners to Render Information.) Partners shall render on demand true and full information of all things affecting the partnership to any partner or the legal rep-

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resentative of any deceased partner or partner under legal disability.

Sec. 21. (Partner Accountable as Fiduciary.) (1) Every partner must account to the partnership for any benefit, and hold as trustee for it any profits derived by him without the consent of the other partners from any transaction connected with the formation, conduct or liquidation of the partnership or from any use by him of its property.

(2) This section applies also to the representatives of a deceased partner engaged in the liquidation of the affairs of the partnership as the personal representative of the last surviving partner.

Sec. 22. (Right to an Account.) Any partner shall have the right to a formal account as to partnership affairs:

(a) If he is wrongfully excluded from the partnership business or possession of its property by his copartners,

(b) If the right exists under the terms of any agreement,

(c) As provided by section 21,

(d) Whenever other circumstances render it just and reasonable.

Sec. 23. (Continuation of Partnership Beyond Fixed Term.) (1) When a partnership for a fixed term or particular undertaking is continued after the termination of such term or particular undertaking without any express agreement, the rights and duties of the partners remain the same as they were at such termination, so far as is consistent with a partnership at will.

(2) A continuation of the business by the partners or such of them as habitually acted therein during the term, without any settlement or liquidation of the partnership affairs, is prima facie evidence of a continuation of the partnership.

PART V

PROPERTY RIGHTS OF A PARTNER

Sec. 24. (Extent of Property Rights of a Partner.) The property rights of a partner are (1) his rights in specific partner-

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ship property, (2) his interest in the partnership, and (3) his right to participate in the management.

Sec. 25. (Nature of a Partner's Right in Specific Partnership Property.)

(1) A partner is co-owner with his partners of specific partnership property holding as a tenant in partnership.

(2) The incidents of this tenancy are such that:

(a) A partner, subject to the provisions of this act and to any agreement between the partners, has an equal right with his partners to possess specific partnership property for partnership purposes; but he has no right to possess such property for any other purpose without the consent of his partners.

(b) A partner's right in specific partnership property is not assignable except in connection with the assignment of the rights of all the partners in the same property.

(c) A partner's right in specific partnership property is not subject to attachment or execution, except on a claim against the partnership. When partnership property is attached for a partnership debt the partners, or any of them, or the representatives of a deceased partner, can not claim any right under the homestead or exemption laws.

(d) On the death of a partner his right in specific partnership property vests in the surviving partner or partners, except where the deceased was the last surviving partner, when his right in such property vests in his legal representatives. Such surviving partner or partners, or the legal representative of the last surviving partner, has no right to possess the partnership property for any but a partnership purpose.

(e) A partner's right in specific partnership property is not subject to dower, curtesy, or allowances to widows, heirs, or next of kin.

Sec. 26. (Nature of Partner's Interest in the Partnership.) A partner's interest in the partnership is his share of the profits and surplus, and the same is personal property.

Sec. 27. (Assignment of Partner's Interest.) (1) A conveyance by a partner of his interest in the partnership does not of

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itself dissolve the partnership, nor, as against the other partners in the absence of agreement, entitle the assignee, during the continuance of the partnership, to interfere in the management or administration of the partnership business or affairs, or to require any information or account of partnership transactions, or to inspect the partnership books; but it merely entitles the assignee to receive in accordance with his contract the profits to which the assigning partner would otherwise be entitled.

(2) In case of a dissolution of the partnership, the assignee is entitled to receive his assignor's interest and may require an account from the date only of the last account agreed to by all the partners.

Sec. 28. (Partner's Interest Subject to Charging Order.) (1) On due application to a competent court by any judgment creditor of a partner, the court which entered the judgment, order, or decree, or any other court, may charge the interest of the debtor partner with payment of the unsatisfied amount of such judgment debt with interest thereon; and may then or later appoint a receiver of his share of the profits, and of any other money due or to fall due to him in respect of the partnership, and make all other orders, directions, accounts and inquiries which the debtor partner might have made, or which the circumstances of the case may require.

(2) The interest charged may be redeemed at any time before foreclosure, or in case of a sale being directed by the court may be purchased without thereby causing a dissolution:

(a) With separate property, by any one or more of the partners, or

(b) With partnership property, by any one or more of the partners with the consent of all the partners whose interests are not so charged or sold.

(3) Nothing in this act shall be held to deprive a partner of his right, if any, under the exemption laws, as regards his interest in the partnership.

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PART VI

DISSOLUTION AND WINDING UP

Sec. 29. (Dissolution Defined.) The dissolution of a partnership is the change in the relation of the partners caused by any partner ceasing to be associated in the carrying on as distinguished from the winding up of the business.

Sec. 30. (Partnership Not Terminated by Dissolution.) On dissolution the partnership is not terminated, but continues until the winding up of partnership affairs is completed.

Sec. 31. (Causes of Dissolution.) Dissolution is caused:

(1) Without violation of the agreement between the partners,

(a) By the termination of the definite term or particular undertaking specified in the agreement,

(b) By the express will of any partner when no definite term or particular undertaking is specified,

(c) By the express will of all the partners who have not assigned their interests or suffered them to be charged for their separate debts, either before or after the termination of any specified term or particular undertaking,

(d) By the expulsion of any partner from the business bona fide in accordance with such a power conferred by the agreement between the partners;

(2) In contravention of the agreement between the partners, where the circumstances do not permit a dissolution under any other provisions of this section, by the express will of any partner at any time;

(3) By any event which makes it unlawful for the business of the partnership to be carried on or for the members to carry it on in partnership;

(4) By the death of any partner;

(5) By the bankruptcy of any partner or the partnership;

(6) By decree of court under section 32.

Sec. 32. (Dissolution by Decree of Court.) (1) On application by or for a partner the court shall decree a dissolution whenever:

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(a) A partner has been declared a lunatic in any judicial proceeding or is shown to be of unsound mind,

(b) A partner becomes in any other way incapable of performing his part of the partnership contract,

(c) A partner has been guilty of such conduct as tends to affect prejudicially the carrying on of the business,

(d) A partner wilfully or persistently commits a breach of the partnership agreement, or otherwise so conducts himself in matters relating to the partnership business that it is not reasonably practicable to carry on the business in partnership with him,

(e) The business of the partnership can only be carried on at a loss,

(f) Other circumstances render a dissolution equitable.

(2) On the application of the purchaser of a partner's interest under sections 28 or 29:

(a) After the termination of the specified term or particular undertaking,

(b) At any time if the partnership was a partnership at will when the interest was assigned or when the charging order was issued.

Sec. 33. (General Effect of Dissolution on Authority of Partner.) Except so far as may be necessary to wind up partnership affairs or to complete transactions begun but not then finished, dissolution terminates all authority of any partner to act for the partnership,

(1) With respect to the partners,

(a) When the dissolution is not by the act, bankruptcy or death of a partner; or

(b) When the dissolution is by such act, bankruptcy or death of a partner, in cases where section 34 so requires.

(2) With respect to persons not partners, as declared in section 35.

Sec. 34. (Right of Partner to Contribution From Copartners After Dissolution.) Where the dissolution is caused by the act, death or bankruptcy of a partner, each partner is liable to his copartners for his share of any liability created by any partner act-

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ing for the partnership as if the partnership had not been dissolved, unless

(a) The dissolution being by act of any partner, the partner acting for the partnership had knowledge of the dissolution, or

(b) The dissolution being by the death or bankruptcy of a partner, the partner acting for the partnership had knowledge or notice of the death or bankruptcy.

Sec. 35. (Original.) (Power of Partner to Bind Partnership to Third Persons After Dissolution.) (1) If the partnership is not dissolved because it has become unlawful to carry on the business, a partner can not, after dissolution, bind the partnership to third persons by any act which is not necessary to wind up the partnership affairs or to complete transactions then unfinished unless

(a) Such third person, having had relations with the partnership by which a credit was extended upon the faith of the partnership, has had no knowledge or notice of the dissolution; or

(b) Such third person, not having had business relations with the partnership by which credit was extended to the partnership, has no knowledge or notice of the dissolution, and the fact of dissolution has not been advertised in a newspaper of general circulation of the place (or of each place if more than one) at which the partnership business was regularly carried on.

(2) The partnership is in no case bound by the acts of a partner who has become bankrupt; but this provision does not affect the liability of any person who, as declared by section 16, after bankruptcy, has represented himself, or consented to another's representing him to be a partner of the bankrupt.

NOTE—Section 35 of the Uniform Partnership Act as it was adopted in Pennsylvania and Wisconsin was amended later by the drafters of the act. See 29 Harv. L. Rev. 312.

The amended section follows:

Section 35. (As Amended.) "After dissolution a partner can bind the partnership except as provided in paragraph (3)

(a) By any act appropriate for winding up partnership affairs or completing transactions unfinished at dissolution;

(b) By any transaction which would bind the partnership if dissolution had not taken place provided the other party to the transaction:

(I) Had extended credit to the partnership prior to dissolution and had no knowledge or notice of the dissolution; or

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Sec. 36. (Effect of Dissolution on Partner's Existing Liability.) (1) The dissolution of the partnership does not of itself discharge the existing liability of any partner.

(2) A partner is discharged from any existing liability upon dissolution of the partnership by an agreement to that effect between himself, the partnership creditor and the person or partnership continuing the business; and such agreement may be inferred from the course of dealing between the creditor having knowledge of the dissolution and the person or partnership continuing the business.

(3) Where a person agrees to assume the existing obligations of a dissolved partnership, the partners whose obligations have been assumed shall be discharged from any liability to any creditor of the partnership who, knowing of the agreement, consents to a material alteration in the nature or time of payment of such obligations.

(4) The individual property of a deceased partner shall be lia-

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(II) Though he had not so extended credit, had nevertheless known of the partnership prior to dissolution, and having no knowledge or notice of dissolution, the fact of dissolution had not been advertised in a newspaper of general circulation in the place (or in each place if more than one), at which the partnership business was regularly carried on.

(2) The liability of a partner under paragraph (1b) shall be satisfied out of partnership assets alone when such partner had been prior to dissolution;

(a) Unknown as a partner to the persons with whom the contract is made; and

(b) So far unknown and inactive in partnership affairs that the business reputation of the partnership could not be said to have been in any degree due to his connection with it.

(3) The partnership is in no case bound by any act of a partner after dissolution:

(a) Where the partnership is dissolved because it is unlawful to carry on the business, unless the act is appropriate for winding up partnership affairs; or,

(b) Where the partner has become bankrupt; or

(c) Where the partner has no authority to wind up partnership affairs, except by a transaction with one who

(I) Had extended credit to the partnership prior to dissolution and had no knowledge or notice of his want of authority; or

(II) Had not extended credit to the partnership prior to dissolution, and, having no knowledge or notice of his want of authority, the fact of his want of authority has not been published as provided in paragraph (1bII)

(4) Nothing in this section shall affect the liability under section 16 of any person who, after dissolution, represents himself or consents to another representing him as a partner in a partnership engaged in carrying on business."

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ble for all obligations of the partnership incurred while he was a partner but subject to the prior payment of his separate debts.

Sec. 37. (Right to Wind Up.) Unless otherwise agreed, the partners who have not wrongfully dissolved the partnership or the legal representative of the last surviving partner, not bankrupt, has the right to wind up the partnership affairs; provided, however, that any partner, his legal representative, or his assignee, upon cause shown, may obtain winding up by the court.

Sec. 38. (Rights of Partners to Application of Partnership Property.) (1) When dissolution is caused in any way, except in contravention of the partnership agreement, each partner, as against his copartners and all persons claiming through them in respect of their interest in the partnership, unless otherwise agreed, may have the partnership property applied to discharge its liabilities, and the surplus applied to pay in cash the net amount owing to the respective partners. But if dissolution is caused by expulsion of a partner, bona fide under the partnership agreement, and if the expelled partner is discharged from all partnership liabilities, either by payment or agreement under section 36 (2), he shall receive in cash only the net amount due him from the partnership.

(2) When dissolution is caused in contravention of the partnership agreement the rights of the partners shall be as follows:

(a) Each partner who has not caused dissolution wrongfully shall have,

I. All the rights specified in paragraph (1) of this section, and

II. The right, as against each partner who has caused the dissolution wrongfully, to damages for breach of the agreement.

(b) The partners who have not caused the dissolution wrongfully, if they all desire to continue the business in the same name, either by themselves or jointly with others, may do so, during the agreed term for the partnership and for that purpose may possess the partnership property, provided they secure the payment by bond approved by the court, or pay to any partner who had caused the dissolution wrongfully, the value of his interest in the partnership at the dissolution, less any damages recoverable under clause

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(2aII) of this section, and in like manner indemnify him against all present or future partnership liabilities.

(c) A partner who has caused the dissolution wrongfully shall have:

I. If the business is not continued under the provisions of paragraph (2b) all the rights of a partner under paragraph (1), subject to clause (2aII), of this section,

II. If the business is continued under paragraph (2b) of this section the right as against his copartners and all claiming through them in respect of their interests in the partnership, to have the value of his interest in the partnership, less any damages caused to his copartners by the dissolution, ascertained and paid to him in cash, or the payment secured by bond approved by the court, and to be released from all existing liabilities of the partnership, but in ascertaining the value of the partner's interest the value of the good-will of the business shall not be considered.

Sec. 39. (Rights Where Partnership is Dissolved for Fraud or Misrepresentation.) Where a partnership contract is rescinded on the ground of the fraud or misrepresentation of one of the parties thereto, the party entitled to rescind is, without prejudice to any other right, entitled,

(a) To a lien on, or right of retention of, the surplus of the partnership property after satisfying the partnership liabilities to third persons for any sum of money paid by him for the purchase of an interest in the partnership and for any capital or advances contributed by him; and

(b) To stand, after all liabilities to third persons have been satisfied, in the place of the creditors of the partnership for any payments made by him in respect of the partnership liabilities; and

(c) To be indemnified by the person guilty of the fraud or making the representation against all debts and liabilities of the partnership.

Sec. 40. (Rules for Distribution.) In settling accounts between the partners after dissolution, the following rules shall be observed, subject to any agreement to the contrary:

(a) The assets of the partnership are:

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I. The partnership property,

II. The contributions of the partners necessary for the payment of all the liabilities specified in clause (b) of this paragraph.

(b) The liabilities of the partnership shall rank in order of payment, as follows:

I. Those owing to creditors other than partners,

II. Those owing to partners other than for capital and profits,

III. Those owing to partners in respect of capital,

IV. Those owing to partners in respect of profits.

(c) The assets shall be applied in the order of their declaration in clause (a) of this paragraph to the satisfaction of the liabilities.

(d) The partners shall contribute, as provided by section 18 (a) the amount necessary to satisfy the liabilities; but if any, but not all, of the partners are insolvent, or, not being subject to process, refuse to contribute, the other partners shall contribute their share of the liabilities, and, in the relative proportions in which they share the profits, the additional amount necessary to pay the liabilities.

(e) An assignee for the benefit of creditors or any person appointed by the court shall have the right to enforce the contributions specified in clause (d) of this paragraph.

(f) Any partner or his legal representative shall have the right to enforce the contributions specified in clause (d) of this paragraph, to the extent of the amount which he has paid in excess of his share of the liability.

(g) The individual property of a deceased partner shall be liable for the contributions specified in clause (d) of this paragraph.

(h) When partnership property and the individual properties of the partners are in the possession of a court for distribution, partnership creditors shall have priority on partnership property and separate creditors on individual property, saving the rights of lien or secured creditors as heretofore.

(i) Where a partner has become bankrupt or his estate is insolvent the claims against his separate property shall rank in the following order:

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I. Those owing to separate creditors,

II. Those owing to partnership creditors,

III. Those owing to partners by way of contribution.

Sec. 41. (Liability of Persons Continuing the Business in Certain Cases.) (1) When any new partner is admitted into an existing partnership, or when any partner retires and assigns (or the representative of the deceased partner assigns) his rights in partnership property to two or more of the partners, or to one or more of the partners and one or more third persons, if the business is continued without liquidation of the partnership affairs, creditors of the first or dissolved partnership are also creditors of the partnership so continuing the business.

(2) When all but one partner retire and assign (or the representative of a deceased partner assigns) their rights in partnership property to the remaining partner, who continues the business without liquidation of partnership affairs, either alone or with others, creditors of the dissolved partnership are also creditors of the person or partnership so continuing the business.

(3) When any partner retires or dies and the business of the dissolved partnership is continued as set forth in paragraphs (1) and (2) of this section, with the consent of the retired partners or the representative of the deceased partner, but without any assignment of his right in partnership property, rights of creditors of the dissolved partnership and of the creditors of the person or partnership continuing the business shall be as if such assignment had been made.

(4) When all the partners or their representatives assign their rights in partnership property to one or more third persons who promise to pay the debts and who continue the business of the dissolved partnership, creditors of the dissolved partnership are also creditors of the person or partnership continuing the business.

(5) When any partner wrongfully causes a dissolution and the remaining partners continue the business under the provisions of section 38 (2b), either alone or with others, and without liquidation of the partnership affairs, creditors of the dis-

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solved partnership are also creditors of the person or partnership continuing the business.

(6) When a partner is expelled and the remaining partners continue the business either alone or with others, without liquidation of the partnership affairs, creditors of the dissolved partnership are also creditors of the person or partnership continuing the business.

(7) The liability of a third person becoming a partner in the partnership continuing the business, under this section to the creditors of the dissolved partnership shall be satisfied out of partnership property only.

(8) When the business of a partnership after dissolution is continued under any conditions set forth in this section the creditors of the dissolved partnership, as against the separate creditors of the retiring or deceased partner or the representative of the deceased partner, have a prior right to any claim of the retired partner or the representative of the deceased partner against the person or partnership continuing the business, on account of the retired or deceased partner's interest in the dissolved partnership or on account of any consideration promised for such interest or for his right in partnership property.

(9) Nothing in this section shall be held to modify any right of creditors to set aside any assignment on the ground of fraud.

(10) The use by the person or partnership continuing the business of the partnership name, or the name of a deceased partner as part thereof, shall not of itself make the individual property of the deceased partner liable for any debts contracted by such person or partnership.

Sec. 42. (Rights of Retiring or Estate of Deceased Partner When the Business is Continued.) When any partner retires or dies, and the business is continued under any of the conditions set forth in section 41 (1, 2, 3, 5, 6), or section 38 (2b), without any settlement of accounts as between him or his estate and the person or partnership continuing the business, unless otherwise agreed, he or his legal representative as against such persons or partnership may have the value of his interest at the date of dis-

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solution ascertained, and shall receive as an ordinary creditor an amount equal to the value of his interest in the dissolved partnership with interest, or, at his option or at the option of his legal representative, in lieu of interest, the profits attributable to the use of his right in the property of the dissolved partnership; provided that the creditors of the dissolved partnership as against the separate creditors, or the representative of the retired or deceased partner, shall have priority on any claim arising under this section, as provided by section 41 (8) of this act.

Sec. 43. (Accrual of Actions.) The right to an account of his interest shall accrue to any partner, or his legal representative, as against the winding up partners or the surviving partners or the person or partnership continuing the business, at the date of dissolution, in the absence of any agreement to the contrary.

PART VII

MISCELLANEOUS PROVISIONS

Sec. 44. (When Act Takes Effect.) This act shall take effect on the —— day of —— one thousand nine hundred and ——.

Sec. 45. (Legislation Repealed.) All acts or parts of acts inconsistent with this act are hereby repealed.

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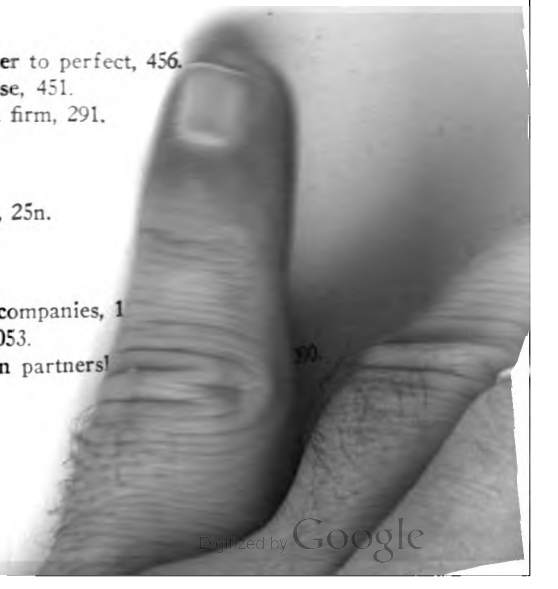

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